Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

DENISE M. KENNEDY,

Petitioner,

v.

SCHOENBERG, FISHER & NEWMAN, LTD. AND ROBERT C. GOLDBERG,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

The issue presented to this Court asks the question which was left unanswered in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251, 109 S. Ct. 1775, 1791 (1989), and that is; what evidence constitutes "direct evidence" of discriminatory intent sufficient to shift the burden of persuasion to the employer in Title VII mixed-motive cases.

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PETITION FOR WRIT OF CERTIORARI

Denise M. Kennedy, ("Kennedy") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this case on April 3, 1998, in order to define and/or clarify what constitutes direct evidence of discriminatory intent under Title VII of the Civil Rights Act of 1964 and as amended in 1991.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit that gives rise to this petition is a published opinion found at 140 F.3d 716, 728 (7th Cir. 1998). Judgment in accordance with the Court's Opinion was entered on the docket on April 3, 1998. *See* App. A at App. 1 through App. 26.

JURISDICTION

On May 19, 1997, the United States District Court for the Northern District of Illinois, Eastern Division, granted summary judgment in favor of the defendants, Schoenberg, Fisher & Newman, Ltd., a Chicago law firm, and its shareholder and partner, Robert C. Goldberg, on plaintiff's wrongful termination claims brought under the Pregnancy Discrimination Act of Title VII of the Civil Rights Act 42 U.S.C. § 2000e(k) *et seq.* (1978). *See* App. B at App. 27 through App. 59. Plaintiff timely appealed the District Court's decision to the United States Court of

Appeals for the Seventh Circuit. On April 3, 1998, the Court of Appeals affirmed the trial court's grant of summary judgment in a published opinion found at 140 F.3d 716, 728 (7th Cir. 1998).

Pursuant to 28 U.S.C. § 2102(c) and Supreme Court Rule 13.1, this petition has been filed within 90 days of the date of publication of the Seventh Circuit Court of Appeals' opinion. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Jurisdiction in the United States District Court for the Northern District of Illinois, Eastern Division, was invoked pursuant to 28 U.S.C. § 1331, 28 U.S.C. § 1367, and the Pregnancy Discrimination Act, 42 U.S.C. § 2000e2(a)(1), as amended by 42 U.S.C. § 2000e(k), and 42 U.S.C. § 1981(a), (b).

STATUTES INVOLVED IN THE CASE

Title VII of the Civil Rights Act makes it "an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual or to otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individuals . . . sex." 42 U.S.C. § 2000e-2(a). In 1978, Congress amended Title VII to prohibit discrimination on the basis of pregnancy. The Pregnancy Discrimination Act (PDA) "brought discrimination based on pregnancy within a woman's protection against sex discrimination." 42 U.S.C. § 2000e(k). The PDA provides that "[w]omen affected by pregnancy, childbirth, or related medical conditions shall be treated

the same for all employment – related purposes . . . as other persons not so affected but similar in their ability or inability to work." 42 U.S.C. § 2000e(k). Consequently, an unlawful employment practice is established whenever pregnancy is a motivating factor for an adverse employment decision. 42 U.S.C. § 2000e-2(m). *See* App. C (Statutory Provisions) at App. 60 through App. 61.

STATEMENT OF THE CASE

The District Court granted the defendants' motion for summary judgment holding that the plaintiff failed to produce sufficient direct or circumstantial evidence to demonstrate that her termination was a result of intentional discrimination on account of her pregnancy or childbirth. *See Kennedy v. Schoenberg, Fisher & Newman, Ltd.*, 1997 WL 488285 (N.D. Ill. 1997). The Seventh Circuit Court of Appeals affirmed holding that statements made by the plaintiff's supervising attorney and law firm partner (Goldberg) to the plaintiff and others such as: "if you were my wife, I would not want you working after having children" and plaintiff "should be home with her kids now, with her child now, that she shouldn't be working" did not constitute direct or circumstantial evidence of intentional discrimination so as to avoid summary judgment. *See Kennedy v. Schoenberg, Fisher & Newman, Ltd.*, 140 F.3d at 723 (7th Cir. 1998).

The Seventh Circuit Court of Appeals further held that direct evidence is that which, "if believed by the trier of fact, will prove the particular fact in question without reliance upon inference or presumption." *Kennedy*, 140

F.3d at 724, *quoting, Hunt-Golliday v. Metropolitan Water Reclamation Dist. of Greater Chicago,* 104 F.3d 1004, 1010 (7th Cir. 1997). "To rise to the level of direct evidence of discrimination, this Court has stated that "isolated comments must be contemporaneous with the discharge or casually related to the discharge decision making process." *Id., quoting, Geier v. Medtronic, Inc.,* 99 F.3d 238, 242 (7th Cir. 1996). Applying these evidentiary principles to Goldberg's statements, the Seventh Circuit Court of Appeals held that "[t]he comment[s] attributed to Goldberg, viewed in the light most favorable to plaintiff, does not satisfy the temporal or causal criteria required by this Court, and thus does not rise to the level of direct evidence of discrimination." *Kennedy v. Schoenberg, Fisher & Newman, Ltd.,* 140 F.3d at 724.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

The issue presented to this Court is whether direct evidence of discriminatory intent is satisfied where the facts reveal that the plaintiff's supervisor, Goldberg, an influential partner in the defendant's law firm, repeatedly informed the plaintiff and other employees after he learned of plaintiff's pregnancy and throughout plaintiff's pregnancy that *"if you were my wife, I would not want you working after having children"*, and plaintiff *"should be at home with her kids now, with her child now, that she shouldn't be working."* The facts further revealed that upon plaintiff's return from maternity leave, Goldberg placed the plaintiff on work probation and provided her with little to no work. Finally, the evidence demonstrated that, less than two months after the plaintiff gave birth to her

child and returned from maternity leave, she was terminated at a firm partner's meeting, the law firm extended an offer of employment to a male law school graduate not yet licensed to practice law, Goldberg insisted that the plaintiff's future employment with the firm be placed on the partner's meeting agenda, and a fellow partner at the meeting described Goldberg's participation as *"unusually quiet."* The Petitioner contends that the statements and conduct exhibited by the plaintiff's supervisor and law firm partner constitutes sufficient direct evidence of discriminatory intent to have justified shifting the burden of persuasion to the employer in this mixed-motives Title VII case.

In *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251, 109 S. Ct. 1775, 1791 (1989), this Court held that "[c]onventional rules of civil litigation generally apply in Title VII cases, *see, e.g., United States Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 716, 103 S. Ct. 1478, 1482, 75 L.Ed.2d 403 (1983) (*discrimination not to be "treated differently from other ultimate questions of fact"*), and one of these rules is that parties to civil litigation need only prove their case by a preponderance of the evidence." In her concurring opinion, Justice O'Connor defined the term "direct evidence" in the negative noting that, stray remarks in the workplace, statements by nondecision-makers, or statements by decision-makers unrelated to the decisional process itself, would not constitute direct evidence of discrimination. *Price Waterhouse v. Hopkins*, 490 U.S. 228 at 277, 109 S. Ct. 1775 at 1804-05. However, this Court did not define, outside of the facts presented in that case, the affirmative proposition of exactly what constitutes direct evidence of discriminatory intent

sufficient to justify shifting the burden of persuasion to the employer in Title VII mixed motive cases. *Id.*[1]

Consequently, the various Circuit Courts of Appeals define direct evidence as "evidence which if believed, proves the fact of discriminatory intent without inference or presumption." *See, e.g., Brown v. East Mississippi Elec. Power Ass'n*, 989 F.2d 858, 861 (5th Cir. 1993), *rehearing denied*, 995 F.2d 225 (5th Cir. 1993); *LaSalle Telecommunications, Inc.*, 876 F.2d 563, 569 (7th Cir. 1989). These courts generally hold that evidence of discriminatory intent must rise to the level of an "admission" or a "smoking gun" before it will be deemed "direct evidence" sufficient to shift the burden of proof to the employer. *See, e.g., Troupe v. May Dept. States Co.*, 20 F.3d 734, 739 (7th Cir. 1994).

However, Judge Bownes, in his concurring opinion in *Smith v. F.W. Morse & Co., Inc.*, 76 F.3d 413, 431-32 (1st Cir. 1996), noted that definitions of direct evidence such as "evidence which, in and of itself, shows a discriminatory animus" is circular and does not further the understanding of that term. Judge Bownes suggested the following alternative:

> Rather than adhering to the colorful but meaningless requirement of a smoking gun, I think we should adopt a definition of direct evidence in Title VII cases, which satisfies the minimum negative requirements Justice O'Connor set out in Price Waterhouse [citation omitted]. In accord

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[1] The plurality opinion in *Price Waterhouse* did not itself require direct evidence of discrimination. The reference to direct evidence appears in Justice O'Connor's concurrence in that case. *See, e.g.*, 490 U.S. at 270-74, 109 S. Ct. at 1801-03.

> with the Civil Rights Act of 1991, this definition preserves the mixed-motives case as a viable option in Title VII suits. [citation omitted]. It lowers the high hurdle of "smoking gun" evidence to reasonable limits so that plaintiffs in employment discrimination cases can receive all the protections that Title VII was intended to give.

Smith v. F.W. Morse & Co., Inc., 76 F.3d 413 at 433 (1st Cir. 1994) (*Bownes, J. concurring.*)

Because all knowledge is inferential, a certain amount of inference drawing is always necessary in any Title VII case where the critical issue is the intent or motive of the employer or decision-maker. Consequently, a definition of direct evidence which prohibits any resort to inference cannot *ipso facto* turn otherwise clear and direct evidence into indirect evidence and thus, compel a Title VII plaintiff to forfeit her right to proceed under the *Price Waterhouse* mixed-motives analysis in favor of the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 18917, 36 L.Ed.2d 668 (1973). For even in *Price Waterhouse*, the statements which were found to constitute direct evidence of discriminatory intent required some level of inferential reasoning. *Price Waterhouse v. Hopkins*, 490 U.S. 228 at 272-73, 109 S. Ct. 1775 at 1802-03. Therefore, the rule that direct evidence of discriminatory intent cannot, by definition, include any resort to inference places a greater evidentiary burden upon plaintiffs in Title VII mixed-motives cases than in other civil cases and this Court has previously held that conventional rules of civil litigation apply in Title VII cases. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 251,

109 S. Ct. 1775, 1795 (1989) (*conventional rules of civil litigation generally apply in Title VII cases.*)

CONCLUSION

WHEREFORE, for the foregoing reasons, the Petitioner respectfully requests that her Petition For Writ Of Certiorari be granted.

Respectfully submitted,

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APPENDIX A

Denise M. KENNEDY, Plaintiff-Appellant,

v.

SCHOENBERG, FISHER & NEWMAN, LTD., and Robert C. Goldberg, Defendants-Appellees.

No. 97-2347.

United States Court of Appeals, Seventh Circuit.

Argued Nov. 6, 1997.

Decided April 3, 1998.

Dean A. Dickie, D'Ancona & Pflaum, Ruth I. Major, Patrick M. Ouimet (argued), Sarles & Ouimet, Chicago, IL, for Plaintiff-Appellant.

Susan Benton-Powers (argued), Diane I. Smason, Sonnenschein, Nath & Rosenthal, Robert M. Chemers, Edward B. Ruff, Scott L. Howie, Pretzel & Stouffer, Chicago, IL, for Defendants-Appellees.

Before CUMMINGS, MANION and EVANS, Circuit Judges.

CUMMINGS, Circuit Judge.

Plaintiff Denise Kennedy, an attorney, was terminated from her employment at defendant Schoenberg, Fisher & Newman ("SF & N"), a small law firm in Chicago, Illinois. Plaintiff filed a complaint against defendants SF & N and its shareholder and partner Robert C. Goldberg ("Goldberg"), alleging wrongful termination under the Pregnancy Discrimination Act ("PDA") (Count I), discrimination under the PDA due to defendant SF & N's disability leave policy (Count II), defamation (Count

III), and tortious interference with employment relationship (Count IV). The district court granted summary judgment in favor of defendants on Counts I and II, the federal pregnancy discrimination claims, and declined to exercise supplemental jurisdiction over plaintiff's state law claims (Counts III and IV), dismissing them without prejudice. Plaintiff now appeals the district court's decision to grant summary judgment in favor of defendant SF & N on plaintiff's claim that she was terminated because of her pregnancy in violation of the PDA and the district court's refusal to exercise supplemental jurisdiction over the state law claims.[1] For the following reasons, we affirm.

I.

In November 1988, plaintiff was hired by the National Office Machine Dealers Association ("NOMDA") as a Staff Attorney. Goldberg, a shareholder of SF & N and outside General Counsel to NOMDA, had recommended plaintiff for the position. Plaintiff began earning $25,000 as Staff Attorney at NOMDA, and by January 1991, her Staff Attorney salary had increased to $35,000.

---

[1] Plaintiff does not appeal the district court's decision to grant summary judgment on Counts I and II to defendant Goldberg individually, which concluded that Goldberg cannot be personally liable because he is not an "employer" within the meaning of the PDA. Furthermore, plaintiff does not challenge the district court's holding that defendant SF & N was entitled to summary judgment on Count II, and thus plaintiff's claim that defendant SF & N's disability leave policy discriminates against pregnant employees is not the subject of this appeal.

In January 1991, plaintiff informed Goldberg that she was considering leaving NOMDA because she wanted to broaden her legal experience and increase her income. Goldberg recommended to the six other shareholders of defendant SF & N that they hire plaintiff as an associate corporate attorney. During her interview, plaintiff was told that, if hired, she was expected to work for clients of defendant SF & N other than NOMDA. Thereafter plaintiff and defendant SF & N reached an "understanding" regarding her work allocation, plaintiff believing she could delegate approximately thirty to forty percent of her NOMDA work to non-lawyer SF & N employees. Relying on these assurances, defendant SF & N hired plaintiff as an associate attorney. On March 1, 1991, she began work at a salary of $50,000.

In July 1991, defendant SF & N conducted a review of plaintiff's performance which indicated that plaintiff's "overall analytic ability and problem solving skills," her "writing ability," and her "overall contribution to the firm's legal work" needed improvement. Defendant SF & N also voiced concern that plaintiff was not delegating enough of her NOMDA work to other SF & N employees. An SF & N shareholder told plaintiff that she was not performing enough non-NOMDA billable work to justify her salary. In order to help plaintiff shift thirty to forty percent of her NOMDA work to other employees, defendant SF & N agreed to provide plaintiff with assistance from clerical personnel and/or paralegals.

In the beginning of July 1991, plaintiff voiced an interest in drafting an amicus curiae brief to be filed with the United States Supreme Court on behalf of NOMDA in a pending antitrust appeal involving the Eastman Kodak

Company. Goldberg, as General Counsel for NOMDA, was responsible for the brief and permitted plaintiff to draft it. Plaintiff had at least two months to complete the brief. In that time, Goldberg set various deadlines for plaintiff to submit drafts, which plaintiff missed. Plaintiff ultimately submitted a draft to Goldberg ten days before the brief was due to which Goldberg responded that he would have liked more time to edit the brief and that he had inadequate time for revisions and additional research. Goldberg was dissatisfied with the final brief and expressed his disappointment to plaintiff. Additionally, plaintiff made mistakes which incurred significant added costs for defendant SF & N. Plaintiff did not have the brief typeset until two days before it was due, which resulted in additional costs for expedited printing. Plaintiff also submitted the brief to the Supreme Court with the wrong color cover, which resulted in rejection of the brief by the Supreme Court and a $1,600 cost for resubmission. The Supreme Court rejected the brief a second time because the brief was submitted again with the wrong color cover. Resubmission another time cost another $260.

In August or September of 1991, plaintiff received a request from a NOMDA member to complete a contract analysis. Plaintiff knew that time was of the essence. However, before she left for vacation, plaintiff informed Goldberg that she failed to perform the analysis in time. This inaction on plaintiff's part cost the NOMDA member a business opportunity, and Goldberg had to apologize for plaintiff's incompetence.

In November 1991, plaintiff told Goldberg that she was pregnant. Prior to that time, no SF & N attorney had

ever taken a disability leave, and defendant SF & N did not have a paid leave policy in place. After researching the policies of other law firms, in February 1992, defendant SF & N adopted the following paid leave policy:

> Attorneys – Less than three years seniority – use of unused vacation (assumed for this purpose to be two weeks) and sick days (assumed for this purpose to be six days) plus four weeks pay at 50 percent of current rate.
>
> Attorneys – Three years or more seniority – use of unused vacation and sick days (same assumed entitlements) plus six weeks pay at 50 percent of current rate.

Plaintiff did not feel that defendant SF & N's paid leave policy was generous enough and would have preferred more in terms of paid leave. Pursuant to the policy, defendant SF & N began keeping track of plaintiff's absences to determine how many paid sick and vacation days she would get during her leave.

Plaintiff began her maternity leave in June 1992. From January 1992 until the time of her leave, plaintiff billed approximately 88% of her time to her NOMDA position. Prior to her leave, plaintiff trained Tamara Kling, a temporary attorney who was hired at the $36,000 Staff Attorney salary to perform only NOMDA Staff Attorney work while plaintiff was on leave.

Before her leave ended, plaintiff informed Goldberg that she wanted to return part-time as NOMDA Staff Attorney. She presented two alternatives: three days a week in the office for NOMDA and available to work out of her home on a fourth day, or a full-day job share with Kling. The Personnel Chairman of NOMDA rejected these

options due to the inconvenience and added expense they would cause. Thus Tamara Kling remained as NOMDA Staff Attorney. Plaintiff then asked to work three days per week, and defendant SF & N agreed to accommodate her part-time schedule, cautioning that she must "actively seek work from the Firm" and respond to clients in a timely manner.

During plaintiff's leave of absence, plaintiff requested to attend the NOMDA annual convention in Las Vegas. The parties dispute whether plaintiff was required to prepare the materials for the convention and whether they were prepared sufficiently. After the convention, plaintiff submitted an expense report listing expenses chargeable to NOMDA, including a car rental and a $25.75 dinner expense for July 17, 1992.

Because plaintiff had not received prior approval for the car rental and because she had not rented the car from the company NOMDA had selected, Goldberg questioned the car rental expense. In a memo to Goldberg, plaintiff responded that Goldberg did not notify her as to which rental company had been selected by NOMDA. Plaintiff then modified her expense report, deleting the car rental expense.

Goldberg continued to withhold approval of the expense report, questioning plaintiff's dinner charge of $25.75 on July 17 since plaintiff attended an awards banquet that evening which served dinner. In response to Goldberg's refusal to approve the report, plaintiff submitted an amended expense report which omitted the $25.75 charge and added two dinners of $10 each for July 15, 1992 and July 16, 1992 and a breakfast of $5.75 for July 16,

1992, resulting in a total charge of $25.75. During her deposition, plaintiff admitted that she fabricated the subsequent three meal charges which totaled $25.75 and that the original dinner charge was for a meal eaten by her parents who were at the convention to look after her baby.

Goldberg informed plaintiff that he was submitting the expense report to NOMDA without his approval. In response to NOMDA accounts payable clerk Kay Nedrud's inquiry as to why Goldberg had not approved the expense report, Goldberg sent Nedrud a letter indicating the adjustments necessary in order for the report to pass muster under NOMDA's standards. Goldberg sent copies of the letter to the Executive Director, Personnel Chairman and Accounting Manager of NOMDA. None of these recipients viewed the letter as accusing plaintiff of dishonesty, lacking moral integrity, defrauding NOMDA, or padding or falsifying her expenses.

Upset with Goldberg's letter, plaintiff wrote a memorandum to Goldberg, charging him with making "false" accusations against her in the letter. In response, Goldberg wrote a memorandum addressing plaintiff's claims. Plaintiff responded with another memorandum, and then she circulated one of her memos to all SF & N partners. Goldberg in turn forwarded his most recent memo to the same partners of SF & N. Plaintiff also discussed her conflict with Goldberg with individuals at SF & N who advised her to attempt to resolve her differences with him.

In addition to her conflict with Goldberg, plaintiff remained unproductive after her maternity leave. Furthermore, defendant SF & N was beginning to experience a "slowdown" in its corporate practice. At a meeting on November 2, 1992, the shareholders of defendant SF & N discussed the conflict between plaintiff and Goldberg and plaintiff's lack of productivity as the firm's income went down. Goldberg refrained from speaking substantively about plaintiff at this meeting and abstained from the shareholder vote regarding her termination. On November 2, 1992, the shareholders voted to terminate plaintiff's employment due to her disruptive conflict with Goldberg, her consistent lack of productivity, and the slowdown in work at the firm. The shareholders offered plaintiff two months severance pay in exchange for the execution of a release of claims document which plaintiff refused to sign.

Plaintiff filed her original complaint on July 27, 1993, and an amended complaint on March 25, 1994. Count I asserts a claim against defendants for wrongful termination under the PDA, and Count II contends that defendant SF & N's disability leave policy discriminates against pregnant women. Count III asserts a claim against defendants for defamation. Count IV seeks recovery against defendants for tortious interference with employment relationship. Defendants filed motions for summary judgment. The district court granted summary judgment on the federal claims (Counts I and II) and refused to exercise jurisdiction over the state claims (Counts III and IV), dismissing them without prejudice. Plaintiff now appeals the district court's decision to grant summary judgment in favor of defendant SF & N on plaintiff's

claim that she was terminated because of her pregnancy in violation of the PDA and the district court's refusal to exercise supplemental jurisdiction over the state law claims.

Finding plaintiff's claims without merit, we affirm the district court's order granting summary judgment in favor of defendants and dismissing the state claims without prejudice.

II.

We review a district court order granting summary judgment de novo. *Geier v. Medtronic, Inc.*, 99 F.3d 238, 240 (7th Cir.1996). We affirm a grant of summary judgment when the record, viewed in a light most favorable to the non-moving party, reveals that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). "The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202. We apply the summary judgment standard with particular care in employment discrimination cases, which often turn on the issues of intent and credibility. *Geier*, 99 F.3d at 240.

Title VII of the Civil Rights Act makes it "an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual or to otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of

employment, because of such individual's * * * sex." 42 U.S.C. § 2000e-2(a). In 1978, Congress amended Title VII to prohibit discrimination on the basis of pregnancy. *Geier*, 99 F.3d at 241. The Pregnancy Discrimination Act "brought discrimination based on pregnancy within a woman's protections against sex discrimination." 42 U.S.C. § 2000e(k); *see Hunt-Golliday v. Metropolitan Water Reclamation Dist. of Greater Chicago*, 104 F.3d 1004, 1010 (7th Cir.1997). The PDA provides that "[w]omen affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes * * * as other persons not so affected but similar in their ability or inability to work." 42 U.S.C. § 2000e(k); *see Troupe v. May Dept. Stores Co.*, 20 F.3d 734, 735 (7th Cir.1994). An unlawful employment practice is established whenever pregnancy is a motivating factor for an adverse employment decision. 42 U.S.C. § 2000e-2(m); *see Hunt-Golliday*, 104 F.3d at 1010.

While the PDA does not impose an affirmative duty on employers to offer maternity leave or to take other measures to assist pregnant employees, it does require that the employer treat the employee as well as it would have if she were not pregnant. *Piraino v. International Orientation Resources, Inc.*, 84 F.3d 270, 274 (7th Cir.1996). The issue before this Court, therefore, is whether plaintiff Kennedy presented a question of fact as to whether she was treated differently because of her pregnancy.

Plaintiff may establish a case of sex discrimination in order to avoid summary judgment in one of two ways. First, plaintiff may present enough evidence to demonstrate that her discharge was a result of intentional discrimination. *Geier*, 99 F.3d at 241. Plaintiff may establish

this discriminatory motivation through either "direct evidence, e.g., an acknowledgment on the part of the employer of discriminatory intent, or – as is more usually the case – by relying on circumstantial evidence, e.g., ambiguous statements or suspicious timing." *Id.* If a plaintiff demonstrates that an employment decision was motivated in part by her pregnancy, the defendant cannot avoid a finding of liability by proving that it would have made the same decision had the plaintiff not been pregnant, but can escape monetary damages in such a situation. *See* 42 U.S.C. § 2000e-5(g)(2)(B).

Alternatively, plaintiff may avoid summary judgment by using the *McDonnell Douglas* burdenshifting approach. Under that approach, plaintiff must establish a prima facie case of discrimination by demonstrating that (1) plaintiff was a member of a protected class; (2) plaintiff was performing to her employer's legitimate expectations; (3) despite her performance, plaintiff was discharged; and (4) others, similarly situated but not in the protected class, were treated more favorably. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668. If plaintiff establishes a prima facie case, the burden shifts to the defendant who must produce a legitimate, non-discriminatory reason for plaintiff's treatment to avoid liability. *Geier*, 99 F.3d at 241-242. The plaintiff then has the opportunity to demonstrate that the proffered explanation is pretextual. *Id.* at 242; *see also Sheehan v. Daily Racing Form, Inc.*, 104 F.3d 940, 940 (7th Cir.1997), *certiorari denied*, ___ U.S. ___, 117 S.Ct. 2480, 138 L.Ed.2d 989.

The plaintiff in this case tried both methods of avoiding summary judgment but was unsuccessful in each. She

did not produce any direct or circumstantial evidence demonstrating that defendant SF & N terminated her because of her pregnancy and likewise failed to establish a pregnancy discrimination case under the *McDonnell Douglas* approach.

A. Plaintiff Produced No Evidence of Intentional Discrimination – Either Direct or Circumstantial

A plaintiff can establish pregnancy discrimination by presenting either direct or circumstantial evidence of discriminatory intent. *Piraino*, 84 F.3d at 274. Plaintiff argues that certain comments and conduct by Goldberg qualify as evidence of intentional discrimination. Specifically, plaintiff points to the following alleged remarks and conduct by Goldberg: (1) soon after Goldberg became aware that plaintiff was pregnant, he "repeatedly told [plaintiff] that 'if you were my wife, I would not want you working after having children' " and told other SF & N employees that plaintiff "should be home with her kids now, with her child now, that she shouldn't be working;" (2) less than four weeks after plaintiff announced her pregnancy, Goldberg wrote a memorandum dated November 26, 1991, criticizing plaintiff's work performance; (3) Goldberg responded "Yes" to plaintiff's inquiry as to whether he was building a "case" against plaintiff; and (4) while Goldberg and plaintiff were friendly before plaintiff announced her pregnancy, plaintiff claims that "[s]hortly after Goldberg learned of Ms. Kennedy's pregnancy, [Goldberg] became distant, cold, and acrimonious toward Ms. Kennedy." We agree with the district court's conclusion that none of the above comments and conduct by

Goldberg constituted enough evidence to avoid summary judgment on plaintiff's claim that her discharge was a result of intentional discrimination.

Direct evidence is that which, "if believed by the trier of fact, will prove the particular fact in question without reliance upon inference or presumption." *Hunt-Golliday*, 104 F.3d at 1010 (quoting *Randle v. LaSalle Telecommunications, Inc.*, 876 F.2d 563, 569 (7th Cir.1989)). Direct evidence of discriminatory intent in pregnancy discrimination cases generally is in the form of an admission by a supervisor or decision maker that the employee was suspended because she was pregnant. *Troupe*, 20 F.3d at 736. To rise to the level of direct evidence of discrimination, this Court has stated that "isolated comments must be contemporaneous with the discharge or causally related to the discharge decision making process." *Geier*, 99 F.3d at 242.

In *Geier*, this Court held that the comment "Have all the kids you would like – between spring, summer, and fall. I will not work your territory during the winter months" made by the plaintiff's supervisor in the context of discussing plaintiff's familial plans during a long car trip was not direct evidence of discriminatory intent. *Id.* The Court found that the comment, made a year prior to plaintiff's discharge, was not temporally related to plaintiff's termination. *Id.* The Court also found that even though the comment was made by plaintiff's supervisor, there was no causal nexus between the comment and the decision to discharge because the remark was made in a casual conversation during a long car trip, a setting unrelated to discussions of the poor work performance which led to plaintiff's dismissal. *Id.*

Here none of the comments and conduct by Goldberg indicate that at the time defendant SF & N made its decision to terminate plaintiff, it was motivated by plaintiff's pregnancy in deciding to discharge her. Specifically, the comment attributed to Goldberg, "if you were my wife, I would not want you working after having children," does not demonstrate an acknowledgment of discriminatory intent in connection with defendant SF & N's decision to discharge plaintiff. The comment was made at least five months before plaintiff's termination and thus was not temporally related to her discharge. In addition, there was no causal nexus between the comment and plaintiff's discharge. The alleged remark, made while Goldberg and plaintiff were discussing the "joys of children," occurred in a casual setting unrelated to discussions regarding the issues which led to plaintiff's dismissal. Furthermore, the conclusion that there was no nexus between Goldberg's alleged comment and the decision to terminate plaintiff is reinforced by the fact that Goldberg, after having allegedly made the above remark, was instrumental in facilitating plaintiff's return to work by agreeing to create a new part-time associate position in order to accommodate her desire to work when no such position had existed previously. It defies common sense to believe that Goldberg would so willingly accommodate plaintiff's part-time request after her pregnancy if SF & N did not want her to return to work due to her pregnancy.

Plaintiff attempts to show a causal nexus between Goldberg's comment and the decision to terminate her by arguing that Goldberg provided false information to the shareholders that plaintiff falsified her NOMDA expense

reports and, in reliance, the shareholders terminated her. However, the evidence does not support this argument, and, even if it did, her claim based on the expense report would not support an allegation of pregnancy discrimination.

Finally, even if Goldberg's comment could be viewed as discriminatory, it does not serve as evidence plaintiff was terminated for discriminatory reasons because Goldberg, even though plaintiff's supervisor, was not a decision maker in the determination to terminate plaintiff. It is undisputed that Goldberg did not speak significantly about plaintiff at the meeting regarding her termination and also abstained from the vote to terminate her. As this Court has stated in *Randle v. LaSalle Telecommunications, Inc.*, 876 F.2d 563, 569 (7th Cir.1989), direct evidence of discriminatory intent "must not only speak directly to the issue of discriminatory intent, it must also relate to the specific employment decision in question." *See also Hong v. Children's Memorial Hospital*, 993 F.2d 1257, 1266 (7th Cir.1993), *certiorari denied*, 511 U.S. 1005, 114 S.Ct. 1372, 128 L.Ed.2d 48 (holding that discriminatory remarks, "when unrelated to the decisional process, are insufficient to demonstrate that the employer relied on illegitimate criteria").

We agree with the district court that plaintiff Kennedy's "direct" evidence was not sufficient to raise a genuine issue of material fact about the existence of discriminatory intent. The comment attributed to Goldberg, viewed in the light most favorable to plaintiff, does not satisfy the temporal or causal criteria required by this Court and thus does not rise to the level of direct evidence of discrimination.

Plaintiff also had the opportunity to prove discriminatory intent using circumstantial evidence. In *Troupe*, 20 F.3d at 736, this Court recognized three types of circumstantial evidence of intentional discrimination: "(1) a mosaic of evidence which, taken together, would permit a jury to infer discriminatory intent; (2) comparative evidence showing that employees similarly situated to the plaintiff other than in the protected characteristic received systematically better treatment; and (3) pretext evidence, where the plaintiff is qualified for and fails to receive the desired treatment, and the employer's stated reason for the difference is unworthy of belief." *Piraino*, 84 F.3d at 274.

Plaintiff's argument falls basically into the first of these three categories. The mosaic of evidence which permits an inference of discriminatory intent usually consists of evidence of "ambiguous statements, suspicious timing, discrimination against other employees and other pieces of evidence nonconclusive in itself but together composing a convincing mosaic of discrimination against the plaintiff." *Troupe*, 20 F.3d at 737. Plaintiff alleges that the timing of Goldberg's criticism of plaintiff's performance, SF & N's recording of plaintiff's absences, Goldberg's alleged response that he was building a case against plaintiff, and Goldberg and plaintiff's dispute regarding the expense report constitute sufficient circumstantial evidence to establish an inference of discriminatory intent.[2] We agree with the district court that such

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[2] While the district court referred to and analyzed the alleged conduct and comments by Goldberg as "direct" evidence, the evidence, with the exception of the alleged

evidence does not lead to an inference of pregnancy discrimination.

Although plaintiff claims that Goldberg first criticized her work after he learned she was pregnant, she was aware of the substance of his criticisms prior to that time. Plaintiff's testimony establishes that she was aware of Goldberg's dissatisfaction with her handling of the Kodak brief before it was filed in September 1991. In addition, plaintiff was aware of other failures regarding her NOMDA work which occurred before she announced her pregnancy. Thus Goldberg's November 1991 memo criticizing plaintiff is not sufficient to establish an inference of pregnancy discrimination.

Plaintiff also claims that she was treated differently than other SF & N employees because defendant SF & N kept track of her absences after instituting its disability leave pay policy. However, SF & N did so because plaintiff was the first and only associate attorney to take a disability leave after institution of the new policy and, as a result, it was unnecessary for the firm to record other attorneys' absences. Thus defendant SF & N's monitoring plaintiff's absences does not lead to an inference of pregnancy discrimination.

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statement "[i]f you were my wife, I would not want you working after having children," is more appropriately classified as "circumstantial." However, regardless of the label assigned to the evidence, the district court properly evaluated and rejected the evidence as presenting a triable issue of pregnancy discrimination.

Additionally, Goldberg's alleged response that he was building a "case" against plaintiff is insufficient evidence from which to infer pregnancy discrimination. As the district court correctly noted, "there is nothing in the record which reflects that the alleged 'case' related to plaintiff's pregnancy, or that any such case relating to plaintiff's pregnancy was relied upon at the time that defendant SF & N made its decision to terminate plaintiff's employment."

Finally, plaintiff alleges that Goldberg's "letter writing campaign" against her indicates that she was discriminated against due to her pregnancy. However, Goldberg was not motivated by plaintiff's pregnancy in bringing the issue of plaintiff's expense reports to the attention of the shareholders of defendant SF & N. Concerned with incorrectly billing defendant SF & N's client, Goldberg was justified in expressing concern regarding plaintiff's expense report which was revised three times, especially in light of the fact that plaintiff eventually admitted that she fabricated the $25.75 meal charge. Goldberg's conduct provides no basis for inferring that plaintiff was terminated due to her pregnancy. Furthermore, plaintiff provides no evidence even establishing that she was terminated because of her falsification of the expense reports. The shareholders at defendant SF & N have maintained that plaintiff was discharged due to her conflict and acrimonious dispute with Goldberg, her lack of productivity, and the slowdown in the firm's corporate work. None of the evidence presented by plaintiff regarding Goldberg's alleged comments or conduct comprise a mosaic of circumstantial evidence linking plaintiff's termination with her pregnancy.

B. Plaintiff Could Not Establish Pregnancy Discrimination Under the *McDonnell Douglas* Approach

As previously stated, in order to establish a prima facie case under the *McDonnell Douglas* framework, plaintiff must show that (1) she was a member of a protected class; (2) she was performing to her employer's legitimate expectations; (3) despite her performance, she was discharged; and (4) others, similarly situated but not in the protected class, were treated more favorably. *See McDonnell Douglas*, 411 U.S. at 802. If plaintiff establishes a prima facie case, the burden shifts to the defendant who must produce a legitimate, non-discriminatory reason for plaintiff's treatment to avoid liability. *Geier*, 99 F.3d at 241-242. The plaintiff then has the opportunity to demonstrate that the proffered explanation for the employment decision is pretextual. *Id.* at 242.

We agree with the district court that plaintiff did not establish a prima facie case of pregnancy discrimination under the *McDonnell Douglas* approach. While plaintiff satisfied the first and third elements and may even have satisfied the second element, she clearly did not present evidence proving the fourth element, that others, similarly situated but not in the protected class, were treated more favorably.

Plaintiff satisfied the first element because she was a member of a protected class of pregnant women and the third element because she was terminated after revealing her pregnancy.

It is a closer call as to whether plaintiff produced evidence to demonstrate that she was performing to her

employer's legitimate expectations. Defendant SF & N claimed that plaintiff fell short of its expectations because she was involved in an acrimonious conflict with Goldberg and because she was unproductive at a time when the firm's corporate department was experiencing a slowdown. The district court found defendant's arguments without merit and found that plaintiff was performing to defendant's expectations because, as defendant SF & N conceded, plaintiff was not discharged "for her failure to acceptably perform substantive legal work."In reaching this conclusion, however, the district court ignored this Court's prior ruling that "an employee's 'performance' is not necessarily confined to an appraisal of his or her substantive work." *Oates v. Discovery Zone*, 116 F.3d 1161, 1171 (7th Cir.1997). Therefore, the fact that plaintiff engaged in a hostile dispute with one of the firm's partners after being counseled to put an end to it could lead to the conclusion that plaintiff was not performing to her employer's legitimate expectations. However, we agree with the district court's conclusion that the fact that plaintiff failed to be productive when the corporate department was experiencing a slowdown does not necessarily lead to the conclusion that she was not performing up to her employer's legitimate expectations. The evidence reveals that "[t]here was certainly some question as to whether Ms. Kennedy could be productive under those business conditions." In fact, because of the slowdown experienced by the firm's corporate department, defendant SF & N discharged another attorney in the corporate practice and did not hire a new corporate attorney until March 1994 when the firm's corporate work increased. Thus it is reasonable that plaintiff may

have been less productive because she had less work to do due to the slowdown and may have been performing to her employer's legitimate expectations.

Even if plaintiff satisfied the second element of the *McDonnell Douglas* framework in that she was performing up to her employer's legitimate expectations, she clearly did not present any evidence proving the fourth element, that there were other similarly situated non-pregnant attorneys at defendant SF & N who were treated more favorably than plaintiff or who replaced plaintiff. The district court correctly noted that plaintiff did not establish that Tamara Kling was a similarly situated employee treated more favorably. Plaintiff was paid $50,000 to perform legal work for NOMDA and other clients of SF & N. While defendant SF & N retained Kling when it discharged plaintiff, Kling's job was to perform NOMDA Staff Attorney functions; she did not work for any other clients at SF & N besides NOMDA; and she was paid $36,000, the salary for a NOMDA Staff Attorney. Thus plaintiff fails to show that Kling was a similarly situated non-pregnant attorney who was treated more favorably than plaintiff.

Plaintiff claims that defendant SF & N treated an individual not in her protected class more favorably when it hired a new male attorney with less legal experience after plaintiff was discharged. However, as the district court concluded, this claim is baseless. Defendant SF & N did in fact hire a new associate, but he was an associate for the litigation department, not the corporate practice. He was hired to replace a litigation associate with whom the firm was dissatisfied and thus discharged. Plaintiff was not considered for the position

because she was not a litigator nor did she ask to be considered for a position in the litigation department. Thus the district court accurately found that the new litigation associate was not a similarly situated individual who was given more favorable treatment by defendant SF & N than plaintiff.

Finally, plaintiff fails to demonstrate that defendant SF & N hired a corporate associate to take the place of plaintiff or was looking to do so. In fact, following plaintiff's termination, defendant SF & N discharged Lance Lis, the other associate practicing in defendant SF & N's corporate department, due to the slowdown in the firm's corporate practice. Thus, as the district court concluded, "the record is silent regarding whether there were other similarly situated attorneys at defendant SF & N who were not member[s] of the protected class of pregnant women and who were being treated more favorably than plaintiff." Unable to demonstrate that other similarly situated non-pregnant attorneys at defendant SF & N were treated more favorably, plaintiff cannot establish a prima facie case under the *McDonnell Douglas* framework.

Since plaintiff has failed to establish a prima facie case of pregnancy discrimination, it is unnecessary to address whether defendant SF & N has articulated a legitimate non-discriminatory reason for its decision to terminate plaintiff and whether the evidence reveals that such reason is pretextual.

III.

Having determined that summary judgment was appropriate on plaintiff's federal claims against defendants, the district court declined to exercise supplemental jurisdiction over plaintiff's state law claims of defamation and tortious interference with employment relationship. According to the supplemental jurisdiction statute, a district court "may decline to exercise supplemental jurisdiction" over pendent state law claims if the court has dismissed all claims over which it has original jurisdiction. 28 U.S.C. § 1367(c)(3); *see Wright v. Associated Insurance Cos., Inc.*, 29 F.3d 1244, 1250 (7th Cir.1994).

This Court has stated that "the general rule is that, when all federal claims are dismissed before trial, the district court should relinquish jurisdiction over pendent state-law claims rather than resolving them on the merits." *Wright*, 29 F.3d at 1251; *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 727-728, 86 S.Ct. 1130, 1139-40, 16 L.Ed.2d 218. While there are "unusual cases in which the balance of factors to be considered under the pendent jurisdiction doctrine-judicial economy, convenience, fairness and comity – will point to federal decision of the state-law claims on the merits,"[3] the district

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[3] For example, a party may succeed in reversing a district court's decision declining to exercise jurisdiction over pendent state claims in situations where the statute of limitations has run on filing the pendent claims so that the claims cannot be filed timely in state court. *See Duckworth v. Franzen*, 780 F.2d 645, 656 (7th Cir.1985). Additionally, a party may demonstrate that a district court abused its discretion in declining to exercise pendent jurisdiction if an issue of federal law was raised as a dispositive defense to the remaining pendent claims, and the

judge is given broad power in determining whether such circumstances apply and thus whether it is appropriate to retain jurisdiction over the state law claims. *Wright*, 29 F.3d at 1251. "Pendent jurisdiction is a power which the district court, in the exercise of its sound discretion, may choose to grant; it is not a plaintiff's right." *Landstrom v. Illinois Dept. of Children and Family Services*, 892 F.2d 670, 679 (7th Cir.1990); *see Gibbs*, 383 U.S. at 726, 86 S.Ct. at 1139. We will reverse a district court's refusal to exercise this power only upon a showing of abuse of discretion. *Landstrom*, 892 F.2d at 679. "Decisions to relinquish pendent jurisdiction are occasionally reversed." *Disher v. Information Resources, Inc.*, 873 F.2d 136, 140-141 (7th Cir.1989) ("A decision to relinquish pendent jurisdiction before the federal claims have been tried is, as we have said, the norm, not the exception, and such a decision will be reversed only in extraordinary circumstances."). In fact, this Court has characterized the district court's discretion to relinquish pendent jurisdiction as "almost unreviewable," especially when all federal claims have been dropped from the case before trial and only state law claims remain. *Huffman v. Hains*, 865 F.2d 920, 923 (7th Cir.1989). "At that point, respect for the state's interest in applying its own law, along with the state court's greater expertise in applying state law, become paramount concerns." *Id.*

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judge agreed that it was a valid defense but dismissed the suit without prejudice. *See Disher v. Information Resources, Inc.*, 873 F.2d 136, 141 (7th Cir.1989); *Graf v. Elgin, Joliet and Eastern Ry. Co.*, 790 F.2d 1341, 1347 (7th Cir.1986).

Here, the district court did not abuse its discretion in dismissing the state law claims after all federal claims had dropped from the case. The court found that "there is nothing in the record which indicates, and plaintiff does not argue, that judicial economy, convenience, fairness and comity point to federal decision of state law claims on the merits." While the parties claim the case should remain in federal court because the district judge was familiar with both the facts and the law of the case and the parties have undertaken discovery, these considerations are not adequate to make us "second-guess" the district court's decision to relinquish jurisdiction. *See Huffman*, 865 F.2d at 923. We hold, therefore, that the district court was well within its discretion in dismissing plaintiff's state law claims, and the dismissal without prejudice is affirmed.

IV.

Because plaintiff has failed to prove intentional discrimination by direct or circumstantial evidence and has not established a prima facie case of pregnancy discrimination under the *McDonnell Douglas* burden-shifting approach, summary judgment was appropriate on plaintiff's claim that she was terminated because of her pregnancy in violation of the PDA. Plaintiff has not shown that if all the relevant facts were as they are except for the fact of her pregnancy, she would not have been fired. Defendant SF & N terminated plaintiff due to the acrimonious conflict between plaintiff and Goldberg, the slowdown experienced by the firm in its corporate department, and plaintiff's own lack of profitability. Plaintiff has not shown that her termination related in

any way to her pregnancy. Therefore, we affirm the district court's order granting summary judgment in favor of defendant SF & N and dismissing plaintiff's state law claims without prejudice.

AFFIRMED.

APPENDIX B

Denise M. KENNEDY, Plaintiff,

v.

SCHOENBERG, FISHER & NEWMAN, LTD., an Illinois Partnership, and Robert C. Goldberg, Individually and as a partner of Schoenburg, Fisher & Newman, Ltd., Defendants.

No. 93 C 4518.

United States District Court,
N.D. Illinois,
Eastern Division.

May 19, 1997.

MEMORANDUM AND ORDER

MANNING, District Judge.

This matter is before the court on motion of Schoenberg, Fisher & Newman, Ltd., and Robert C. Goldberg, defendants herein, for summary judgment in their favor on all counts of the instant lawsuit brought by plaintiff, Denise M. Kennedy. Plaintiff's action against defendants seeks relief for gender-based employment discrimination, defamation, and tortious interference with employment relationship. Defendants now move this court to enter summary judgment in their favor on all of plaintiff's claims. As discussed in greater detail below, this court grants defendants' motion for summary judgment.

BACKGROUND

The relevant background in this case is as follows. Plaintiff, an attorney, is an Illinois resident. Defendant

Schoenberg, Fisher & Newman, Ltd. (SF & N) is an Illinois professional corporation engaged in the practice of law. Defendant Robert C. Goldberg (Goldberg), an attorney and Illinois resident, is a shareholder and partner of defendant SF & N.

In late 1988, plaintiff was hired as a Staff Attorney for the National Office Machine Dealers Association (NOMDA), a not-for-profit trade association in the business equipment and systems industry. Plaintiff was hired by NOMDA as a Staff Attorney after being recommended for the position by defendant Goldberg who, at the time, was outside General Counsel to NOMDA. Plaintiff's starting salary as a NOMDA Staff Attorney was $25,000. By January of 1991, plaintiff's salary as a NOMDA Staff Attorney had increased to $35,000.

In January of 1991, during a conversation with defendant Goldberg, plaintiff indicated that she was considering looking for other legal employment in order to broaden her legal experience and earn a higher salary. In response, defendant Goldberg made a recommendation to the other shareholders of defendant SF & N that they hire plaintiff as an associate attorney in the firm's corporate practice. Plaintiff was subsequently interviewed for a position with defendant SF & N by several shareholders of defendant SF & N.

During her interview for the associate position, several of defendant SF & N's shareholders told plaintiff that, if hired, they would expect plaintiff to work for clients of defendant SF & N other than NOMDA. In response, plaintiff indicated that she wanted to work for such clients of the firm. At that time, plaintiff and the

shareholders who were present at the interview reached an "understanding" about plaintiff's work allocation. In that connection, plaintiff believed that she could shift approximately thirty to forty per cent of her NOMDA responsibilities to non-lawyer employees of defendant SF & N.

After the interview, plaintiff was hired by defendant SF & N as an associate attorney. Plaintiff began her employment with defendant SF & N on March 1, 1991. Plaintiff's starting salary at defendant SF & N was $50,000.

In July 1991, defendant SF & N reviewed plaintiff's work performance. Plaintiff's reviewers indicated that plaintiff's "overall analytic ability and problem solving skills," her "writing ability," and her "overall contribution to the firm's work" needed improvement. In addition, defendant SF & N appeared to be concerned that plaintiff was not shifting enough of her NOMDA workload to other employees of defendant SF & N. As a result, plaintiff and defendant SF & N agreed that defendant SF & N would provide clerical personnel and/or paralegals to plaintiff in order for her to attempt to shift approximately thirty to forty percent of her NOMDA responsibilities so that she could increase her workload for other clients of defendant SF & N.

In the beginning of July 1991, plaintiff expressed an interest in drafting an amicus curiae brief to submit to the United States Supreme Court on behalf of NOMDA in connection with an antitrust appeal involving the Eastman Kodak Company. As General Counsel of NOMDA who was responsible for the brief, defendant Goldberg

agreed to allow plaintiff to draft the brief. After giving plaintiff this assignment, defendant Goldberg gave plaintiff a sample United States Supreme Court brief with a manila cover for her reference.

Ten days before the brief was due in the Supreme Court, plaintiff submitted a draft to defendant Goldberg for his review. While editing the draft, defendant Goldberg informed plaintiff that he would have liked more time to review the brief. Plaintiff was responsible for having the brief typeset, but did not use a typesetter until two days before the brief was due. Although Kodak amicus brief was initially filed on September 20, 1991, the Supreme Court rejected the brief because the cover of the brief was the wrong color. Resubmission of the brief cost $1,600. The Supreme Court also rejected the brief the second time that it was filed because, like the color of the cover on the first brief, the color of the cover on the second brief was also incorrect. Resubmission of the brief cost an additional $260.

In November 1991, plaintiff informed defendant Goldberg that she was pregnant. At that time, no SF & N attorney had ever taken a disability leave and no paid leave policy existed at the firm. Since no paid leave policy existed at defendant SF & N, defendant SF & N asked plaintiff and the office manager to research the policies of other law firms.

Subsequently, in February 1992, defendant SF & N adopted a paid leave policy. The policy provides:

> Attorneys – Less than three years seniority – use of unused vacation (assumed for this purpose to be two weeks) and sick days (assumed for this

> purpose to be six days) plus four weeks pay at 50 percent of current rate. Attorneys – three years or more seniority – use of unused vacation and sick days (same assumed entitlements) plus six weeks pay at 50 percent of current rate.

Plaintiff believed that most other law firms had paid leave policies which were "more generous" than the one instituted by defendant SF & N. In addition, plaintiff admits that she would have preferred defendant SF & N's paid leave policy to have been "more generous" in terms of paid leave.

Plaintiff began her medical leave in the beginning of June 1992. From January 1992 until the time that she began her maternity leave, approximately eighty-eight per cent of her billable time was billed to the NOMDA Staff Attorney position. Before taking her leave, plaintiff trained Tamara Kling, a temporary attorney hired to perform NOMDA Staff Attorney functions during plaintiff's absence. Kling, who did not work for clients of defendant SF & N other than NOMDA, was paid the Staff Attorney salary of $36,000.

Before the end of plaintiff's leave, plaintiff indicated to defendant Goldberg that she wanted to work for NOMDA on a part-time basis and, in that regard, offered two alternatives. First, plaintiff offered to work three days a week in the office for NOMDA and to be available to work out of her home on a fourth day. Second, plaintiff offered a full-day job share with Tamara Kling. Despite plaintiff's offer of these two alternatives, the Personnel Chairman of NOMDA refused to accept either plan, citing the inconvenience to NOMDA members and increased expense to NOMDA.

After this refusal, plaintiff requested that defendant SF & N permit her to work on a three-day per week part-time basis. In response, defendant SF & N accommodated plaintiff's proposed part-time work schedule which commenced upon her return at the beginning of September 1992. However, subsequent to defendant SF & N's decision to allow plaintiff to work pursuant to a reduced weekly schedule, plaintiff received a memo from defendant SF & N, stating:

> It was emphasized to you the need to actively seek work from the Firm. If at anytime your workload is insufficient, please immediately notify any one of us. The Firm's objective of timely response to our clients was also reviewed. It is imperative that all assignments be completed in a prompt and efficient manner.

During her leave, plaintiff attended the NOMDA annual convention in Las Vegas, Nevada. The parties dispute whether plaintiff was allowed by defendant SF & N to attend the convention instead of Kling only if plaintiff adequately prepared the materials for the convention needed by defendant Goldberg and whether the Convention materials were adequately prepared by plaintiff. However, after the convention, plaintiff filed an expense report wherein she listed as expenses chargeable to NOMDA, inter alia, a car rental and a $25.75 dinner expense for July 17, 1992.

Defendant Goldberg questioned the car expense because plaintiff had not received prior approval for the rental and because plaintiff had not rented the car from the company chosen by NOMDA to serve the convention. Plaintiff, however, responded in a memo to defendant

Goldberg that defendant Goldberg had not informed her which car rental company had been chosen by NOMDA. Plaintiff also reimbursed NOMDA for her car rental expense.

Defendant Goldberg also questioned plaintiff's dinner charge for $25.75 on July 17, 1992, because plaintiff attended an awards banquet that evening. Defendant Goldberg subsequently forwarded NOMDA's request for plaintiff's expense report to plaintiff and informed her that he could not approve her requests for reimbursement. In response, plaintiff submitted an amended expense report to defendant Goldberg which, according to the amended expense report, "more accurately reflect[ed] [her] expenses." In the amended expense report, plaintiff removed the $25.75 charge and added two dinners of $10 each for July 15, 1992, and July 16, 1992, respectively, and a $5.75 breakfast charge for July 6, 1992, for a total sum of $25.75.

Kay Nedrud, the NOMDA accounts payable clerk, communicated with defendant Goldberg about plaintiff's expense report from the Las Vegas trip. On October 13, 1992, defendant Goldberg sent Nedrud a letter (the Nedrud letter) indicating the adjustments on the report. Defendant Goldberg sent copies of the Nedrud letter to the Executive Director, the Personnel Chairman, and the Accounting Manager of NOMDA. None of the recipients of copies of the Nedrud letter interpreted the letter as accusing plaintiff of dishonesty, lacking moral integrity, defrauding NOMDA, or of padding and/or falsifying her expenses.

In a subsequent memorandum to defendant Goldberg, written on October 19, 1992, plaintiff expressed her displeasure with the Nedrud letter. In that memorandum, plaintiff accused defendant Goldberg of making "false" accusations against her in the Nedrud letter. In response, on October 20, 1992, defendant Goldberg wrote a memorandum which was directed at plaintiff's accusations. Plaintiff subsequently submitted her side of the story to the partners of defendant SF & N. Defendant Goldberg followed by forwarding his most recent memo to the same partners of defendant SF & N.

At the time that plaintiff returned from her maternity leave, defendant SF & N was experiencing a "slowdown" of corporate work. At a meeting held on November 2, 1992, the shareholders of defendant SF & N discussed the dispute between plaintiff and defendant Goldberg as well as plaintiff's inability to be productive as the firm's income declined. At this meeting, defendant Goldberg abstained from speaking substantively about plaintiff. With defendant Goldberg abstaining, the shareholders at defendant SF & N voted to terminate plaintiff's employment on November 2, 1992. Shortly after the termination, shareholders of defendant SF & N offered plaintiff two months severance pay in exchange for the execution of a claims document. Plaintiff refused to sign the release.

On July 27, 1993, plaintiff filed her original complaint in this case. On March 25, 1994, after this court granted leave, plaintiff filed an amended complaint (the complaint) in four counts. Count I seeks recovery for wrongful termination based on unlawful pregnancy discrimination. Count II seeks relief against defendants, claiming that defendant SF & N's disability leave policy

discriminated against pregnant women. Count III asserts a claim against defendants for defamation. Count IV seeks relief against defendants for tortious interference with employment relationship. After interim discovery, defendants filed the motions for summary judgment presently before the court.

ANALYSIS

Standard Applicable To A Rule 56(c) Motion for Summary Judgment

This court observes that summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 106 S.Ct. 2505, 2509-10, 91 L.Ed.2d 202 (1986). The movant has the initial burden of establishing that there is no genuine issue of material fact. *See Celotex Corp.*, 477 U.S. at 323, 106 S.Ct. at 2553. If the movant satisfies this burden, the non-movant must then set forth specific facts from the record which demonstrate the existence of a genuine issue for trial. *See id.* at 324, 106 S.Ct. at 2553. However, a scintilla of evidence in support of the non-movant's position is not sufficient to successfully oppose a motion for summary judgment; rather, there must be evidence on which a jury could reasonably find for the non-movant. *See Anderson*, 477 U.S. at 249-50, 106 S.Ct. at 2511. With respect to the standard applicable to a

Rule 56(c) motion for summary judgment, the United States Supreme Court has observed that "the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Id.* at 247-48, 106 S.Ct. at 2510. For the reasons which follow, this court grants defendants' motion for summary judgment in the instant case.

I. Wrongful Termination Under The Pregnancy Discrimination Act (Count I)

Count I of plaintiff's complaint seeks relief against defendants for wrongful termination under the Pregnancy Discrimination Act (PDA). With respect to count I, defendant Goldberg contends that he cannot be held personally liable under Title VII, which the PDA amends. Defendant SF & N argues that it is entitled to summary judgment in its favor on count I because plaintiff has not produced any direct or indirect evidence that defendant SF & N terminated plaintiff because of her pregnancy. This court will address the merits of each of these contentions.

A. Defendant Goldberg

Defendant Goldberg argues that he cannot be held individually liable under the PDA. In so arguing, defendant Goldberg relies upon the Seventh Circuit's decisions in *Williams v. Banning*, 72 F.3d 552, 553 (7th Cir.1995), and *EEOC v. AIC Security Investigations. Ltd.*, 55 F.3d 1276, 1279-82 (7th Cir.1995). In response, plaintiff argues that

defendant Goldberg can be held personally liable because he is a shareholder-attorney of defendant SF & N, not merely plaintiff's supervisor.

This court grants defendant Goldberg's motion for summary judgment on count I of plaintiff's complaint. In particular, this court finds that defendant Goldberg is not an "employer" within the meaning of the PDA. In AIC Security, the Seventh Circuit held that the sole shareholder of the employer which discharged the plaintiff could not be held personally liable under the Americans with Disabilities Act (ADA). *See AIC Security*, 55 F.3d at 1281. The court in AIC Security reasoned that the ADA's definition of the term "employer," like Title VII's use of the term, is merely a statutory expression of respondeat superior liability. *See id.* at 1279-81. Soon after the Seventh Circuit's decision in AIC Security, the Seventh Circuit in Banning, relying on the reasoning in AIC Security, held that a supervisor, in his individual capacity, does not fall within Title VII's definition of employer. *See Banning*, 72 F.3d at 553. More recently, in *Geier v. Medtronic*, 99 F.3d 238, 244 (7th Cir.1996), the Seventh Circuit relied on AIC Security and Banning to hold that a supervisor could not be liable in his individual capacity under the PDA. In so doing, the court in Geier, explicitly recognized that the principles set forth in Banning and AIC Security are applicable to pregnancy discrimination cases. *See id.*

Plaintiff's claim that defendant Goldberg may be held individually liable under the PDA because he is a partner/shareholder of defendant SF & N is without merit. As stated, the Seventh Circuit in AIC Security held that the sole shareholder of the entity which discharged the plaintiff was not an employer within the meaning of

the ADA because the ADA, like Title VII, only expresses a statutory definition of respondeat superior liability. *See AIC Security*, 55 F.3d at 1281. Since AIC Security, the Seventh Circuit has indicated that the principles of AIC Security directly apply in the context of Title VII and, more specifically, in the context of PDA cases. *See Geier*, 99 F.3d at 244; *Banning*, 72 F.3d at 553. Therefore, in view of AIC Security's conclusion that a sole shareholder of the entity that discharged a plaintiff is not an "employer" as that term is used by the ADA (which employs an analogous definition as that used in Title VII), and the Seventh Circuit's subsequent indications that the principles in AIC Security are applicable in the context of Title VII cases, *see Banning*, 72 F.3d at 553, and, more specifically, in PDA cases, *see Geier*, 99 F.3d at 244, this court finds that defendant Goldberg is not an "employer" as that term is used in Title VII, or its amendments in the PDA. Hence, this court grants defendant Goldberg's motion for summary judgment on count I of plaintiff's complaint.

B. Defendant SF & N

This court now addresses defendant SF & N's motion for summary judgment in its favor on plaintiff's claim in count I that she was terminated because of her pregnancy in violation of the PDA. Title VII makes it "an unlawful practice for an employer to fail or refuse to hire or to discharge any individual, or to otherwise discriminate against any individual with respect to his [or her] compensation, terms, conditions, or privileges of employment because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a). In 1978, Congress amended Title VII to extend protection against discrimination to pregnant

women: "The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment purposes." Pub.L. No. 95-555, 92 Stat. 445 (codified as amended at 42 U.S.C. § 2000e(k)). An unlawful employment practice occurs whenever an individual's pregnancy is a motivating factor for an adverse employment decision. 42 U.S.C. § 2000e-2(m); *see Hunt-Golliday v. Metropolitan Water Reclamation District of Chicago*, 104 F.3d 1004, 1010 (7th Cir.1997).

Defendant SF & N maintains that it is entitled to summary judgment on count I of plaintiff's complaint because plaintiff has failed to show that she was terminated because of her pregnancy. Defendant SF & N contends that there is no direct evidence in the record establishing that it terminated plaintiff because of her pregnancy. Defendant SF & N also argues that plaintiff has failed to establish a pregnancy discrimination case based on circumstantial evidence.

1. Plaintiff's Claim In Count I Based On Direct Evidence

It is true, as defendant SF & N points out, that in order to prevail on a pregnancy discrimination claim, a plaintiff may establish a case in one of two ways; either through direct or circumstantial evidence. *See Hunt-Golliday*, 104 F.3d at 1010-11; *Geier*, 99 F.3d at 241-42; *Piraino v. International Orientation Resources, Inc.*, 84 F.3d 270, 274 (7th Cir.1996). The Seventh Circuit has indicated that

direct evidence of discriminatory intent in pregnancy discrimination cases "can be interpreted as an acknowledgement of discriminatory intent by defendant or its agents." *Troupe v. May Department Stores Co.*, 20 F.3d 734, 736 (7th Cir.1994); *see also Hunt-Golliday*, 104 F.3d at 1010; *Geier*, 99 F.3d at 241. By definition, direct evidence " 'if believed by the trier of fact, will prove the particular fact in question without inference or presumption.' " *Hunt-Golliday*, 104 F.3d at 1010 (quoting *Randle v. LaSalle Telecommunications*, 876 F.2d 563, 569 (7th Cir.1989)). Once a plaintiff makes a showing that the employment decision was motivated in part by her pregnancy, the defendant employer may avoid a finding of liability by proving that it would have made the same decision had the plaintiff not been pregnant. *See Geier*, 99 F.3d at 241.

Defendant SF & N contends that there is no evidence in the record of conduct, verbal or otherwise, demonstrating an acknowledgement of discriminatory intent of its part in connection with its decision to discharge plaintiff. Defendant SF & N argues that any evidence in the record of suspicious remarks or conduct by defendant Goldberg is not related to defendant SF & N's decision to terminate plaintiff and therefore does not constitute "direct evidence" that plaintiff was terminated because of her pregnancy. In response, plaintiff argues that there is evidence in the record of remarks and/or conduct by defendant Goldberg constituting evidence of discriminatory intent. Plaintiff claims that evidence in the record of the following remarks and/or conduct by defendant Goldberg constitutes direct evidence of discriminatory intent on the part of defendant SF & N:

(i) defendant Goldberg's memorandum of November 26, 1991, criticizing plaintiff's work performance less than four weeks after plaintiff announced her pregnancy;

(ii) when asked by plaintiff if he was building a "case" against plaintiff, defendant Goldberg responded "Yes;"

(iii) even though plaintiff and defendant Goldberg were friendly before plaintiff announced her pregnancy, "[s]hortly after Goldberg learned of Ms. Kennedy's pregnancy, [Goldberg] became distant, cold, and acrimonious toward Ms. Kennedy;" and

(iv) shortly after defendant Goldberg learned of plaintiff's pregnancy, defendant Goldberg "repeatedly told [plaintiff] that 'if you were my wife, I would not want you working after having children' " and informed other employees of defendant SF & N that plaintiff "should be home with her kids now, with her child now, that she shouldn't be working."

This court finds that none of the above referenced remarks and/or conduct by defendant Goldberg constitute "direct evidence" that defendant SF & N discharged plaintiff because of her pregnancy, i.e., an acknowledgement that defendant SF & N's decision to discharge plaintiff was motivated in part by discriminatory animus. In particular, there is nothing in the record establishing a nexus between defendant Goldberg's remarks and/or conduct and defendant SF & N's decision to terminate plaintiff, or an acknowledgement by defendant SF & N that the decision to discharge plaintiff was motivated in part by her pregnancy. The Seventh Circuit has recognized that direct evidence of discriminatory intent "must

not only speak directly to the issue of discriminatory intent, [but] it must also relate to the specific employment decision in question." *Randle*, 876 F.2d at 569. Indeed, none of the remarks and/or conduct by defendant Goldberg relied on by plaintiff directly reflects that, at the time that defendant SF & N made the decision to discharge plaintiff, defendant SF & N relied in part on plaintiff's pregnancy in making its decision to terminate her employment.

Although plaintiff relies on evidence of defendant Goldberg stating that he was building a "case" against plaintiff, there is nothing in the record which reflects that the alleged "case" related to plaintiff's pregnancy, or that any such case relating to plaintiff's pregnancy was relied upon at the time that defendant SF & N made its decision to terminate plaintiff's employment. The evidence in the record that plaintiff relies on in support of her position that defendant Goldberg was building a "case" against her is a handwritten memo by plaintiff, dated November 23, 1991, which was apparently written for plaintiff's own reference.[1] In the memo, plaintiff summarizes a colloquy between herself and defendant Goldberg occurring in defendant Goldberg's office on November 22, 1991, wherein plaintiff indicates that she was inquiring as to when the two could talk about defendant Goldberg's

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[1] The heading of the memo indicates that the memo is directed "[t]o:" and then below this preposition, the initials "DMK" appear. Other memos in plaintiff's exhibits which were authored by plaintiff refer to her as "DMK." Thus, this court is of the view that the memo is self-directed.

refusal to talk with her. According to the memo, defendant Goldberg responded to plaintiff's inquiry by stating that he was not prepared to speak with her at that time. The memo indicates that plaintiff then asked defendant Goldberg whether he was building a "case" against her and, in response, he said "yes." There is nothing in this memo which suggests that the "case" to which defendant Goldberg allegedly referred related in any way to plaintiff's pregnancy. Indeed, in the memo plaintiff goes on to describe plaintiff asking defendant Goldberg "what I had done to deserve this" to which defendant Goldberg brought up the issue of an unresolved matter involving a client of defendant SF & N. There is nothing in plaintiff's memo which in any way indicates that during the referenced conversation between plaintiff and defendant *Goldberg*, the issue of plaintiff's pregnancy was alluded to in any way, let alone as grounds for plaintiff's termination. Nor is there any evidence of any other conduct in the record, verbal or otherwise, which constitutes an acknowledgement on the part of defendant SF & N that its decision to discharge plaintiff was motivated in part by plaintiff's pregnancy. Hence, defendant SF & N's motion for summary judgment on plaintiff's pregnancy discrimination claim in count I – based on "direct evidence" – is granted.

2. Plaintiff's Claim In Count I Based On Circumstantial Evidence

This court turns to defendant SF & N's argument that plaintiff has failed to make a case – based on circumstantial evidence – that she was discharged by defendant SF

& N because of her pregnancy. At the outset, however, this court addresses an argument raised by defendant SF & N as to the significance of the timing of plaintiff's termination in connection with plaintiff's claim based on circumstantial evidence. In its memorandum in support of its motion for summary judgment, defendant SF & N argues that because plaintiff was not pregnant at the time of her termination, "she failed to meet the prima facie requirement that the plaintiff be pregnant." This argument is without merit. Recently, the Seventh Circuit addressed a similar argument. *See Piraino*, 84 F.3d at 274. In *Piraino*, the plaintiff claimed that upon learning of her pregnancy, the defendant set out to dismiss her from her employment by either crafting a discriminatory leave policy, or by implementing its policy in a discriminatory manner. *See id.* The defendant, however, argued that plaintiff's lawsuit was not a case about pregnancy discrimination because the adverse employment actions (discharge and refusal to reinstate) occurred after plaintiff's pregnancy. *See id.* The Seventh Circuit concluded that plaintiff's lawsuit alleged a claim under the PDA. *See id.* The court in Piraino reasoned that:

> This is therefore not a case in which the claim relates only to an employer's refusal to hire (or reinstate) a mother with a young child, without a hint of any role that the earlier pregnancy played in the decision. Whether it succeeds or fails, it is clear that [plaintiff's] claim alleges pregnancy discrimination. *Id.*

In the instant case, plaintiff's theory is that upon learning of her pregnancy in November 1991, defendant SF & N

set out to find a way to terminate her employment. Plaintiff avers that defendant SF & N achieved its end in this regard by intentionally giving her poor work reviews and/or less work in an attempt to push her out of the firm. Thus, as in *Piraino*, "[w]hether [plaintiff's case] succeeds or fails, it is clear that [plaintiff's] claim alleges pregnancy discrimination." *Id.* This court will therefore address plaintiff's claim based on circumstantial evidence.

Defendant SF & N argues that plaintiff fails to establish a case of pregnancy discrimination under the *McDonnell Douglas* burden-shifting framework. In order to establish a prima facie case under the *McDonnell Douglas* scheme, a plaintiff must show that she was: (i) a member of a protected class; (ii) performing to her employer's legitimate expectations; (iii) discharged; and (iv) others, similarly situated but not of the protected class, were treated more favorably. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973); *Geier*, 99 F.3d at 241. Once a prima facie case is established, the defendant must come forward with a legitimate, non-discriminatory reason for plaintiff's treatment to avoid liability. *See Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253, 101 S.Ct. 1089, 1093-94, 67 L.Ed.2d 207 (1981); *McDonnell Douglas Corp.*, 411 U.S. at 802, 93 S.Ct. at 1824; *Geier*, 99 F.3d at 241-42. After defendant satisfies its burden of production, then plaintiff has the final burden of proving that defendant's profferred reason for the employment decision is merely pretextual. *See Geier*, 99 F.3d at 242.

Applying the *McDonnell Douglas* framework to the case at bar, it is clear that the first and third elements of

plaintiff's prima facie case have been established. The first element is satisfied because the record establishes that plaintiff belonged to a protected class of pregnant women. The third element is satisfied because the record established that plaintiff was discharged after announcing her pregnancy.

This court also finds that the second element – whether plaintiff was performing to her employer's legitimate expectations – is satisfied in the instant case. With respect to this element, the Seventh Circuit has stated that "[t]he critical issue is whether [the plaintiff] was performing her job well at the time of her termination." *Hong v. Children's Memorial Hospital*, 993 F.2d 1257, 1262 (7th Cir.1993). In this case, with some exceptions, the overall quality of plaintiff's substantive legal work is not at issue. Indeed, in its reply brief in support of its motion for summary judgment, defendant SF & N concedes that plaintiff was not discharged "for her failure to acceptably perform substantive legal work." Yet, defendant SF & N maintains that, at the time of plaintiff's discharge, plaintiff was not performing up to its expectations because: (i) "she was engaged in an acrimonious debate with Goldberg regarding her reimbursement claim for improper and falsified expense charges;" and (ii) plaintiff failed to be productive at a time when "the amount of the firm's corporate work was declining and the firm's revenues were decreasing." This court finds that both of these arguments are without merit.

The dispute between plaintiff and defendant Goldberg over plaintiff's Las Vegas expense report is irrelevant to whether plaintiff was performing her job well at the time of her discharge. Plaintiff was hired to do legal

work for NOMDA and for the firm's corporate practice. The dispute regarding the expense report, however, is unrelated to whether plaintiff's substantive work was up to par in either of these two areas.

This court also finds as without merit defendant SF & N's argument that plaintiff was not performing up to expectations at the time of her discharge because of her low work productivity. At the time that plaintiff was discharged, plaintiff was working pursuant to an agreed upon three-day per week part-time work schedule. With this work schedule, plaintiff's productivity would naturally be less than what it was prior to her leave. Moreover, at the time of plaintiff's discharge, defendant SF & N's corporate practice was declining.[2] The affidavit of

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[2] This court recognizes that in her response to paragraph ninety-six of defendants' Rule 12(M) statement of material facts, plaintiff denies that, upon her return, defendant SF & N was experiencing a "slowdown" in corporate work. With respect to plaintiff's response to paragraph ninety-six of defendants' Rule 12(M) statement, i.e., her denial that defendant SF & N was experiencing a "slowdown" in its corporate practice, plaintiff's only reference to the record is an "*Id.*" Given the position of plaintiff's denial's [sic] underneath the reprinted assertion of paragraph ninety-six which contains only a citation to the Richman affidavit, this court construes the "*Id.*" as a reference to the same source relied upon by plaintiff in making this assertion, namely the affidavit of Richman. Upon examination of the Richman affidavit, this court finds that it specifically indicates that defendant SF & N was experiencing a corporate slowdown when plaintiff returned from her leave, and nothing to the contrary. Aside from her denial, plaintiff has not come forward with any materials to contradict that defendant SF & N was experiencing a slowdown in its corporate practice when plaintiff returned from her leave; nor has plaintiff indicated that there are records, and/or other data, supporting her denial

Kenneth H. Richman, a shareholder/partner of defendant SF & N states that "[a]t the time SF & N terminated Kennedy, SF & N's corporate legal practice was declining." In addition, regarding plaintiff's ability to be productive during this decline in business, Richman's deposition testimony concedes that "[t]here was certainly some question as to whether Ms. Kennedy could be productive under those business conditions." Richman's affidavit also states that because of the decline in the firm's corporate practice, in the beginning of 1993, defendant SF & N discharged Lance Lis, "the other SF & N attorney whose primary practice area was corporate law." The Richman affidavit also indicates that defendant SF & N did not hire a new corporate associate until March 1994, after the firm's corporate practice had improved. Thus, since the firm's corporate practice was on the decline at the time of plaintiff's termination, it is understandable that plaintiff's productivity might be lessened because there was less work to do. Neither party directs this court's attention to any materials in the record indicating

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which could not be discovered through a discovery inquiry. Moreover, in plaintiff's response to paragraph ninety-seven of defendants' Rule 12(M) statement, plaintiff admits that "[b]ecause of the slowdown of corporate work, SF & N terminated Lance Lis, a corporate associate at the beginning of 1993," Thus, in view of the fact that plaintiff has not come forward with any materials to rebut the Richman affidavit's assertion relative to the corporate practice "slowdown," along with plaintiff's admission that because of the slowdown, defendant SF & N terminated another of its corporate associates, this court finds that there is no issue of material fact as to whether defendant SF & N was experiencing a "slowdown" in its corporate practice at the time of plaintif's [sic] return from her leave.

the existence of an agreed upon level of productivity for plaintiff upon her return, verbal or otherwise. In the absence of such an agreement regarding plaintiff's work productivity, this court finds that in view of plaintiff's agreed upon part-time work schedule, the overall quality of plaintiff's substantive legal work, and defendant SF & N's declining corporate practice, plaintiff has established the third *McDonnell Douglas* prima facie element of her pregnancy discrimination claim in count I.

This court, however, agrees with defendant SF & N that plaintiff has not established the fourth element of her prima facie case under the *McDonnell Douglas* scheme. In particular, there is nothing in the record demonstrating that there were other similarly situated nonpregnant attorneys at defendant SF & N who were treated more favorably than plaintiff, or who replaced plaintiff. It is undisputed that when defendant SF & N discharged plaintiff, defendant SF & N retained Tamara Kling. However, unlike plaintiff, Kling's position with defendant SF & N only required her to do NOMDA related legal work. As previously discussed, plaintiff trained Kling to perform NOMDA Staff Attorney functions during plaintiff's absence. King did not do work for clients of defendant SF & N other than NOMDA and was paid the NOMDA Staff Attorney salary of $36,000. Plaintiff, however, was hired to do legal work for NOMDA and clients of defendant SF & N other than NOMDA and earned a starting salary of $50,000. Plaintiff does not dispute that she was hired by defendant SF & N to do legal work for both NOMDA and defendant SF & N's corporate clients and that Kling was hired solely to perform NOMDA Staff Attorney functions during plaintiff's absence and continued to fill that role

after plaintiff began a part-time work schedule. Nor does plaintiff dispute that when plaintiff was discharged, Kling's duties were limited to being the full-time SF & N associate assigned to NOMDA Staff Attorney work. Moreover, there is nothing in the record which indicates that at any point prior to plaintiff's discharge, plaintiff asked, or was offered, to fill the role as the full-time SF & N attorney assigned only to do NOMDA Staff Attorney work. Indeed, plaintiff asked, was offered, and subsequently accepted a part-time work schedule from defendant SF & N. As a result, this court finds that plaintiff has not established that Kling was treated more favorably than plaintiff by defendant SF & N.

Plaintiff, however, maintains that soon after she was discharged, defendant SF & N hired a new male attorney with less legal experience and, as such, an individual outside of her protected class was treated more favorably. This argument is also without merit. It is true that the record reveals, and it is undisputed, that soon after plaintiff was discharged, defendant SF & N hired John Garber, as an associate. However, the record demonstrates that Garber's position as an associate was with defendant SF & N's litigation practice, not in its corporate practice. In Richman's deposition, Richman testified that Garber was hired as a litigation associate in order to replace a litigation associate with whom the firm was dissatisfied. Richman's deposition testimony indicates that Garber was hired in the winter of 1992-93, and that the other associate was discharged during that same period. Richman's deposition testimony also indicates that plaintiff was not considered for the position as a litigation associate because she was not a litigator. Similarly, in plaintiff's

deposition testimony, plaintiff concedes that she is not a litigator. Plaintiff stated that "[i]f I had to classify myself, I would say I was a corporate attorney, not a litigator." Moreover, there is nothing in the record reflecting that plaintiff asked to be considered for a position as a litigation associate with defendant SF & N. Thus, in light of this, this court finds that Garber was not a similarly situated individual outside of plaintiff's protected class who was treated more favorably by defendant SF & N than plaintiff.

There is also nothing in the record establishing that defendant SF & N hired an associate to take the place of plaintiff as a corporate associate; or was seeking to replace plaintiff's position as a corporate associate. Indeed, as stated, Richman's affidavit indicates that shortly after plaintiff was discharged, defendant SF & N terminated the employment of Lance Lis, the other associate working in defendant SF & N's corporate practice because the firm's corporate practice was on the decline. Thus, the record is silent regarding whether there were other similarly situated attorneys at defendant SF & N who were not a member of the protected class of pregnant women and who were being treated more favorably than plaintiff. As a result, plaintiff has failed to establish the fourth prima facie element of count I of her case under the *McDonnell Douglas* scheme. Hence, it is unnecessary to inquire into whether, under the *McDonnell Douglas* scheme, defendant SF & N has articulated a legitimate non-discriminatory reason for its decision to terminate plaintiff and whether there is evidence in the record reflecting that any such reason is pretextual.

Plaintiff, however, relies on Piraino and argues that there is a "mosaic of evidence" in the record which establishes an inference of pregnancy discrimination in the instant case. Despite plaintiff's reliance on *Piraino*, *Piraino* is distinguishable from the instant case.[3] In *Piraino*, the issue was whether the plaintiff had satisfied her ultimate burden of proving her pregnancy discrimination case via circumstantial evidence, not whether the plaintiff had adequately established a prima facie case. *See Piraino*, 84 F.3d at 274-276; *see also Troupe*, 20 F.3d at 736. The Seventh Circuit in *Piraino* indicated that the following three types of circumstantial evidence can be relied on in attempting to satisfy a plaintiff's ultimate burden in a pregnancy discrimination case:

> (1) a mosaic of evidence which, taken together, would permit a jury to infer discriminatory intent;

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[3] This court respectfully disagrees with a recent decision indicating that under the Troupe and Piraino methodology for proving pregnancy discrimination cases via circumstantial evidence, the Seventh Circuit has "eschewed" and/or "abrogated" the traditional McDonnell Douglas formulation. *See Castello v. Delta Air Lines*, 1996 WL 563544, *6 (N.D.Ill.1996). Indeed, in two recent cases decided since Troupe and Piraino, the Seveneth Circuit has explicitly recognized the applicability of the McDonell Douglas framework to PDA cases seeking to be proven by circumstantial, rather than direct, evidence. *See Hunt Golliday*, 104 F.3d at 1010; *Geier*, 99 F.3d at 241-42. *See Hunt-Golliday*, 104 F.3d at 1010; *Geier*, 99 F.3d at 241-42. As explained in the body of this disposition, this court is of the view that methodology of proving a case via circumstantial evidence of the type articulated by Troupe and Piraino assumes that a prima facie case has already been made under the McDonnell Douglas framework.

> (2) comparative evidence showing that employees similarly situated to the plaintiff other than in the protected characteristic received systematically better treatment; and (3) pretext evidence, where the plaintiff is qualified for and fails to receive the desired treatment, and the employer's stated reason for the difference is unworthy of belief. *Piraino*, 84 F.3d at 274 (citing to *Troupe*, 20 F.3d at 736).

The court in *Piraino*, however, considered whether circumstantial evidence in rebuttal of the employer's proffered reasons raised an inference that the proffered reasons were a smokescreen for intentional discrimination. *See id.* at 274-76; *see also Troupe*, 20 F.3d at 737. In this case, unlike *Piraino*, plaintiff has not established a prima facie case of pregnancy discrimination. As such, this court does not reach the issue of whether defendant SF & N's reasons for plaintiff's termination were legitimate and/or whether there is circumstantial evidence in the record sufficient to rebut defendant's reasons for her termination. *See, e.g., Geier*, 99 F.3d at 243 (where there was no genuine issue of material fact that plaintiff had not established a prima facie claim of pregnancy discrimination under the McDonnell Douglas framework, court did not proceed to inquire into whether employer's proffered reasons were legitimate and/or whether plaintiff had established final burden of discriminatory intent).

II. Plaintiff's Claim In Count II That Defendant SF & N's Disability Leave Policy Was Discriminatory

This court turns to defendants' motion for summary judgment on count II of plaintiff's complaint. Count II

avers that defendant SF & N's disability leave policy was discriminatory against pregnant women.[4] Count II avers that the policy "only allowed three weeks of full paid leave and four weeks of leave at half the employee's current salary where the employee's disability was caused by pregnancy" and, as such, had a disparate impact on women who became pregnant because, under the policy, "pregnancy became virtually tantamount to a reduction in salary, or dismissal." Count I charges that "[a]s a direct result of SF[&]N's discriminatory disability leave policy, plaintiff was required to deplete her sick and vacation time while male employees in the same class were not."

Defendants contend that they are entitled to summary judgment on count II. Defendant Goldberg's position with respect to count II, like his position relative to count II, is that he is not an "employer" within the meaning of Title VII and is therefore not subject to individual liability in connection with plaintiff's claim in count II. Defendant SF & N, however, argues that it is entitled to summary judgment in its favor on count II because, in its view, plaintiff has not established "that the

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[4] It is unclear whether plaintiffs claim in count II is based on a theory of disparate treatment or disparate impact. The heading for count II describes its claim as one based on "pregnancy disability – disparate treatment." However, the substance of the allegations asserts that the policy had a disparate impact on pregnant women. Despite this ambiguity, this court finds that defendant SF & N is entitled to summary judgment on count II because the record belies any claim that defendant SF & N's paid leave policy disparately treated pregnant women as well as any claim that the policy has a disparate impact on pregnant women.

facially neutral policy had a disparate impact on pregnant employees."

A. Defendant Goldberg

This court grants defendant Goldberg's motion for summary judgment on count II of plaintiff's complaint. As previously discussed, this court finds that defendant Goldberg is not an "employer" as that term is used in Title VII and its amendments in the PDA. *See Geier*, 99 F.3d at 244; *Banning*, 72 F.3d at 553; *AIC Security*, 55 F.3d at 1281. As a result, he may not be held individually liable in connection with plaintiff's pregnancy discrimination claim in count II. Hence, defendant Goldberg's motion for summary judgment on count II is granted.

B. Defendant SF & N

This court finds that, based on the materials in the record, plaintiff's claim against defendant SF & N in count II, whether based on a disparate treatment theory or a disparate impact theory, is without merit. Defendant SF & N's paid leave policy provides:

> Attorneys – Less than three years seniority – use of unused vacation (assumed for this purpose to be two weeks) and sick days (assumed for this purpose to be six days) plus four weeks pay at 50 percent of current rate.
>
> Attorneys – three years or more of seniority – use of unused vacation and sick days (same unassumed entitlements) plus six weeks pay at 50 percent of current rate.

This court finds that defendant SF & N is entitled to summary judgment on count II insofar as count II is based on a disparate treatment theory. As illustrated, defendant SF & N's paid leave policy treated pregnant attorneys at defendant SF & N the same as non-pregnant attorneys with respect to paid vacation and sick leave, as well as general leave. There is no distinction in the policy based on pregnancy, or related medical conditions. *See, e.g., United States v. Board of Education of the Consolidated High School District 230*, 983 F.2d 790, 797-98 (7th Cir.1993) (school board treated pregnant teachers the same as non-pregnant teachers with regard to the use of paid sick leave followed by unpaid general leave); compare *id.* at 798-99 (school board's sick leave bank policy discriminated against pregnant teachers insofar as it automatically excluded withdrawals for maternity benefits as sole nonelective medical disability, but gave the board the discretion to consider all other illnesses). Moreover, there is nothing in the record which reflects that defendant SF & N had an informal, unwritten policy which treated pregnant attorneys differently from nonpregnant attorneys with respect to paid and/or unpaid leave. Compare *Scherr v. Woodland School Community Consolidated District No. 50*, 867 F.2d 974, 982 (7th Cir.1988) (genuine issue of material fact on disparate treatment claim existed as to whether before the lawsuit the defendant had an unwritten policy of preventing nonpregnant teachers from combining paid and unpaid leaves consecutively, when the record demonstrated that the defendant had a policy of preventing pregnant teachers from combining paid sick leave with unpaid maternity leave). Indeed, the only distinction made by the paid leave policy is based on

seniority, not pregnancy. Since the paid leave policy does not treat pregnant attorneys at defendant SF & N differently than nonpregnant attorneys, and there is nothing in the record establishing that defendant SF & N had an unwritten policy of treating pregnant attorneys differently from nonpregnant attorneys with respect to paid and/or unpaid leave, defendant SF & N is entitled to summary judgment on plaintiff's claim in count II insofar as it is based on a theory of disparate treatment.

This court also finds that defendant SF & N is entitled to summary judgment on count II insofar as count II is based on a theory of disparate impact. In particular, there is nothing in the record which establishes that defendant SF & N's paid leave policy was applied differently to plaintiff than to other nonpregnant attorneys employed by defendant SF & N. In *Troupe*, the Seventh Circuit affirmed defendant's motion for summary judgment on plaintiff's pregnancy discrimination claim based on a theory of disparate impact where plaintiff failed to present evidence of "one nonpregnant employee of [the defendant] who had not been fired when about to begin a leave similar in length to hers." *See Trout*, 20 F.3d at 739. Similarly, in the instant case, plaintiff has not produced evidence of any nonpregnant attorney who had taken a disability leave, let alone one who took a leave of a length similar to hers. Thus, as in *Troupe*, plaintiff has failed to present any evidence in support of her disparate impact claim. Defendant SF & N is therefore entitled to summary judgment in its favor on count II of plaintiff's complaint insofar as it is based on a theory of disparate impact. Hence, defendant SF & N's motion for summary judgment based on count II of plaintiff's complaint is granted.

III. Plaintiff's State Law Claims (Counts Ill & IV)

In view of this court's respective findings that defendants are entitled to summary judgment on plaintiff's federal claims before the court, this court declines to exercise jurisdiction over plaintiff's respective state law claims against defendants in counts III and IV of the complaint. Count III is a state law defamation claim. Count IV is a state law claim for tortious interference with employment relationship. Plaintiff's complaint invokes supplemental jurisdiction to bring these state law claims before the court.

The supplemental jurisdiction statute provides that a district court "may decline to exercise supplemental jurisdiction" over pendent state law claims if the court has dismissed all claims over which it has original jurisdiction. 28 U.S.C. § 1367(c)(3); *see Wright v. Associated Insurance Companies, Inc.*, 29 F.3d 1244, 1250 (7th Cir.1994). This court is mindful of the United States Supreme Court's admonition that, in lawsuits based on federal question jurisdiction, "if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well." *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726, 86 S.Ct. 1130, 1139, 16 L.Ed.2d 218 (1966); *see also Wright*, 29 F.3d at 1250-51. This certainly holds true where, as in this case, there is nothing in the record which indicates, and plaintiff does not argue, that judicial economy, convenience, fairness and comity point to federal decision of state law claims on the merits. *See Gibbs*, 383 U.S. at 726-27, 86 S.Ct. at 1139; *Wright*, 29 F.3d at 1251. Therefore,

since jurisdiction in this case is based on a federal question, Title VII, and the dismissal of counts I and II disposes of all of plaintiff's federal claims before the court, this court exercises its discretion to decline to exercise jurisdiction over plaintiff's state law claims under 28 U.S.C. § 1367(c). Accordingly, counts III and IV of plaintiff's complaint are dismissed without prejudice.

CONCLUSION

For the foregoing reasons, defendants' motion for summary judgment is granted.

APPENDIX C

42 U.S.C. § 2000 e-(k)

(k) The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: *Provided,* That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

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42 U.S.C. § 2000e-2. Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer –

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such

individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

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42 U.S.C. § 2000e-2(m)

(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices

Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

Supreme Court, U.S.
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No. 98-66

In The

Supreme Court of the United States

October Term, 1997

DENISE M. KENNEDY,

Petitioner,

vs.

SCHOENBERG, FISHER & NEWMAN, LTD.
and ROBERT C. GOLDBERG,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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COUNTERSTATEMENT OF QUESTION PRESENTED FOR REVIEW

The question presented for review by Petitioner Denise M. Kennedy ("Kennedy") does not accurately reflect the analysis and holding of the United States Court of Appeals for the Seventh Circuit ("Seventh Circuit"). Accordingly, Respondents Schoenberg, Fisher & Newman, Ltd. ("SF&N") and Robert C. Goldberg ("Goldberg") present the following properly framed question:

> Should the Supreme Court grant a writ of certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit affirming summary judgment in favor of Respondents, where Kennedy fails to articulate any basis for review by the Supreme Court and where resolution of Kennedy's request that the Supreme Court "define and/or clarify what constitutes direct evidence of discriminatory intent under Title VII" cannot change the outcome of this case?

RULE 29.6 STATEMENT

This brief is filed on behalf of Schoenberg, Fisher and Newman, Ltd., a law firm, and Robert C. Goldberg. Schoenberg, Fisher and Newman, Ltd. has no parent or subsidiary companies.

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STATEMENT OF THE CASE

The Seventh Circuit affirmed the grant of summary judgment in favor of Respondents by the United States District Court for the Northern District of Illinois.[1] Respondents incorporate by reference the statement of facts in the Seventh Circuit's opinion.[2] Based upon material undisputed facts, the Seventh Circuit concluded that Kennedy failed to present a triable issue of pregnancy discrimination under the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k), based upon her failure to present evidence of intentional discrimination or a *prima facie* case under the *McDonnell Douglas* burdenshifting approach.

As direct evidence, the Seventh Circuit considered one alleged comment by Goldberg, allegedly made at least five months before Kennedy's termination: "[i]f you were my wife, I would not want you working after having children." (App. A at 12-17).[3] Goldberg, the Seventh Circuit concluded, was not

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1. The Seventh Circuit's April 3, 1998 opinion, which is reported at *Kennedy v. Schoenberg, Fisher & Newman, Ltd.*, 140 F.3d 716 (7th Cir. 1998), attached as Appendix A to the Petition for Writ of Certiorari, is referred to herein as "App. A at __".

2. The record before the Seventh Circuit is, in limited instances, referred to herein as "R. __"; "Ex. __."

3. The other comment allegedly made by Goldberg that Kennedy "should be home with her kids now, with her child now, that she shouldn't be working" (App. A at 12) was considered by the Seventh Circuit in its analysis of circumstantial, not direct, evidence. (App. A at 16-17 n.2). Moreover, there is no admissible evidence to support Kennedy's assertion that this comment was made "repeatedly." The only admissible evidence on this point is the testimony of Lisa Zielinski, who stated that Goldberg made a comment to the effect that it was a shame that, for financial reasons, Kennedy would have to work after her leave (R. 100-2, Ex. 15 at 96). Zielinski testified that she heard this comment only once (*Id.* at 97).

a decisionmaker with regard to Kennedy's discharge, and the alleged remark, Kennedy admitted, was made while Goldberg and Kennedy were discussing the "joys of children." (App. A at 14; R. 82, Tab 3 at 284-86). The discussion occurred "in a casual setting unrelated to discussions regarding the issues which led to [Kennedy's] dismissal." (App. A at 14). Thus the Seventh Circuit held that the comment was not temporally or causally related to the firm's decision to terminate Kennedy and did not establish an inference of pregnancy discrimination. (App. A at 14-15). In the Seventh Circuit's view, this conclusion was

> reinforced by the fact that Goldberg, after having allegedly made the above remark, was instrumental in facilitating [Kennedy's] return to work by agreeing to create a new part-time associate position in order to accommodate her desire to work when no such position had existed previously.

(App. A at 14).

The balance of Kennedy's claimed "direct evidence" was considered circumstantial evidence by the Seventh Circuit, and evaluated to determine whether it constituted a "mosaic of evidence which, taken together, would permit a jury to infer discriminatory intent." (App. A at 16-17 n.2).[4] Finding no link

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4. Kennedy's recitation of claimed "direct evidence" contains numerous misstatements and unsubstantiated allegations. There is no record support for, and Kennedy did not assert before the district court or the Seventh Circuit, the statement that "Goldberg insisted that [Kennedy's] future employment with the firm be placed on the partner's meeting agenda." (Petition for Writ of Certiorari ("Cert. Pet.") at 5). Additionally, contrary to Kennedy's suggestion in her petition, she was not replaced following her termination. The referenced "male law school graduate" was hired as a litigation associate; (Cont'd)

between the alleged circumstantial evidence and Kennedy's pregnancy, the Seventh Circuit concluded that the alleged circumstantial evidence, like the alleged direct evidence, did not create a triable issue of pregnancy discrimination.

Finally, the Seventh Circuit concluded that Kennedy failed to state a *prima facie* case of pregnancy discrimination under the *McDonnell Douglas* burdenshifting approach. (App. A at 19-22). Because Kennedy failed to present either direct or circumstantial evidence of intentional discrimination and failed to establish a *prima facie* case of pregnancy discrimination under *McDonnell Douglas*, the Seventh Circuit, on April 3, 1998, after oral argument, affirmed the district court's order granting summary judgment in favor of Respondents. (App. A at 26).

REASONS FOR DENYING THE WRIT

Kennedy presents no basis for granting a writ of certiorari. Under the Seventh Circuit's analysis, Kennedy had three shots at creating a triable issue of pregnancy discrimination: (1) direct evidence of intentional discrimination; (2) circumstantial evidence of intentional discrimination; or (3) a *prima facie* case of pregnancy discrimination under *McDonnell Douglas*. Kennedy failed each analysis. (App. A at 25-26). None of these evidentiary approaches depended upon the existence of a "smoking gun" or "admission" of discriminatory intent, as she now suggests.

(Cont'd)

Kennedy was a corporate associate who neither performed nor sought litigation work with the firm. (App. A at 21-22). Thus the firm's hire of a litigation associate neither provided circumstantial evidence of pregnancy discrimination nor provided a basis for the fourth element of a *prima facie* case of pregnancy discrimination under *McDonnell Douglas*, *i.e.* more favorable treatment of a similarly situated individual. (App. A at 21-22).

Distressed at the outcome, Kennedy now disingenuously suggests that the Seventh Circuit applied an inappropriate definition of "direct evidence" by requiring a "smoking gun" or an "admission" of intentional discrimination to create a triable issue. This characterization of the Seventh Circuit's analysis is simply wrong.[5] Consistent with precedent, under the direct method of proof, the Seventh Circuit allowed Kennedy the opportunity to create a triable issue of pregnancy discrimination using either direct or circumstantial evidence, *i.e.* evidence which permits an inference of discriminatory intent.[6]

In addition, Kennedy asks the Supreme Court to compel lower courts to apply the definition of direct evidence described by Justice O'Connor in her concurring opinion in *Price Waterhouse v. Hopkins*, rather than requiring a "smoking gun" or an "admission" of discriminatory intent. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 277, 109 S. Ct. 1775, 1804-05 (1989) (O'Connor, concurring) (stray remarks by nondecisionmakers or statements by decisionmakers unrelated to the decisional

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5. Kennedy apparently confuses the direct method of proving intentional discrimination with direct evidence. Under the direct method of proof, as compared to the indirect *McDonnell Douglas* method, a Title VII plaintiff must present either direct or circumstantial evidence of intentional discrimination to create a triable issue of pregnancy discrimination. *Troupe v. May Department Stores Company*, 20 F.3d 734, 736 (7th Cir. 1994). In contrast, the indirect *McDonnell Douglas* burdenshifting method requires no evidence of intent.

6. Kennedy argues that requiring her to meet a "smoking gun" standard of direct evidence is tantamount to holding her to a standard of proof higher than preponderance of evidence. This argument, like others she presents in her petition, illustrates her analytical confusion. As discussed herein, the Seventh Circuit did not hold Kennedy to a "smoking gun" standard. Rather, she was given the opportunity to prove intentional discrimination using either direct or circumstantial evidence. She presented neither; accordingly, her claim failed. It is thus nonsensical for Kennedy to argue that she was held to a higher evidentiary standard when she presented no evidence whatsoever of discrimination.

process not sufficient to shift the burden of persuasion to the employer). Again Kennedy mischaracterizes the Seventh Circuit's decision. Rather than requiring evidence of a "smoking gun" or an "admission" for its direct evidence analysis, the Seventh Circuit incorporated the temporal and causal language of Justice O'Connor's definition. In fact, the Seventh Circuit adopted this definition a number of years earlier, applied the definition to the facts of Kennedy's case, and concluded, *inter alia*, that her alleged direct evidence failed to establish intentional discrimination. Thus, even if the Supreme Court grants certiorari here, the outcome of Kennedy's case will not change. Therefore, Kennedy's petition for a writ of certiorari should be denied.

I.

KENNEDY IDENTIFIES NO BASIS FOR GRANTING A WRIT OF CERTIORARI.

In an attempt to create an issue where none exists, Kennedy would lead this Court to believe that the Seventh Circuit ignores any evidence which requires inferential reasoning in a mixed motives case, thus "compel[ling] a Title VII plaintiff to forfeit her right to proceed under the *Price Waterhouse* mixed motives analysis". (Cert. Pet. at 7). Kennedy's characterization of the Seventh Circuit's analysis is incorrect. As stated, Kennedy had the opportunity to prove intentional discrimination under a *Price Waterhouse* mixed motives analysis using either direct or circumstantial evidence; this analysis was not limited to a quest for a "smoking gun" or an "admission" of discriminatory intent.

Ironically, the Seventh Circuit case cited by Kennedy to support her claim that only "smoking gun" evidence shifts the burden of persuasion to the employer in a mixed motive case in the Seventh Circuit, *Troupe v. May Dept. Stores Co.*, 20 F.3d 734 (7th Cir. 1994), holds exactly the opposite. In *Troupe*, the

Seventh Circuit expressly stated that circumstantial evidence, in addition to or in lieu of direct evidence, is admissible to create a triable issue of intentional discrimination. "[C]ircumstantial evidence is admissible too, to provide a basis for drawing an inference of intentional discrimination." *Id.* at 736.

The Seventh Circuit carefully considered all alleged evidence presented by Kennedy. Recognizing as alleged direct evidence the one comment allegedly made to Kennedy by Goldberg, a nondecisionmaker, at least five months prior to her discharge: "if you were my wife, I would not want you working after having children" (App. A at 14; R. 82, Tab 3 at 284-286), the Seventh Circuit found that the comment was not temporally or causally related to Kennedy's discharge, and "thus does not rise to the level of direct evidence of discrimination." (App. A at 14-15).

Notably, in its direct evidence analysis, the Seventh Circuit applied the definition Kennedy now urges this Supreme Court to formally adopt, *i.e.* the temporal and causal definition of direct evidence described by Justice O'Connor in her concurring opinion in *Price Waterhouse*. In fact, the Seventh Circuit adopted this definition of direct evidence a number of years prior to Kennedy's case. *Troupe*, 20 F.3d at 736.

Following its analysis of Kennedy's direct evidence, the Seventh Circuit proceeded to evaluate the alleged circumstantial evidence presented by Kennedy to determine whether it constituted "a mosaic of evidence which, taken together, would permit a jury to infer discriminatory intent." (App. A at 16-18). This analysis, like the direct evidence analysis, demonstrated that Kennedy could not link the alleged evidence to her pregnancy, thus providing no basis to shift the burden of persuasion to the employer under the *Price Waterhouse* mixed motives analysis. (App. A at 18).

It is not the Seventh Circuit's mixed motive analysis or its *McDonnell Douglas* burdenshifting analysis which failed Kennedy. Rather, it is the lack of any evidence of pregnancy discrimination which doomed her case. Kennedy cannot change that outcome by simply mischaracterizing the clearly detailed analysis of the Seventh Circuit. Because Kennedy presents no basis for granting a writ of certiorari, the Supreme Court should deny her petition.

II.

THE ANALYTICAL FRAMEWORK URGED BY KENNEDY CANNOT CHANGE THE OUTCOME OF HER CASE.

In her petition, Kennedy asks this Court to hold that evidence sufficient to shift the burden of persuasion to the employer in a mixed motives case need not rise to the level of a "smoking gun" or an "admission" of discriminatory intent. But, as discussed above, the Seventh Circuit did not hold Kennedy to such a standard; she was provided with every opportunity to prove discriminatory intent using either direct or circumstantial evidence. She failed. Additionally, Kennedy asks this Court to require lower courts to apply Justice O'Connor's *Price Waterhouse* definition in their direct evidence analyses. The Seventh Circuit applied that definition in Kennedy's case. Thus even if Kennedy prevails in her request to this Court, the outcome of her case will not change. Therefore, the Supreme Court should deny Kennedy's petition for writ of certiorari.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that Kennedy's petition for writ of certiorari be denied.

Respectfully submitted,

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In The

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DENISE M. KENNEDY,

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Respondents.

On Petition For Writ Of Certiorari From The United States Court Of Appeals For The Seventh Circuit

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ARGUMENT

I. THIS CASE PROVIDES AN APPROPRIATE VEHICLE FOR THIS COURT TO RESOLVE A CRITICAL QUESTION OF LAW AFFECTING THIS CASE AS WELL AS OTHER DISCRIMINATION CASES BROUGHT PURSUANT TO TITLE VII

The question presented by the petitioner asked this Court to define and/or clarify what constitutes direct evidence of discriminatory intent under Title VII of the Civil Rights Act. *(Pet. Br., p. i.)* The respondents take the petitioner's question a step further and ask, will the resolution of petitioner's question change the outcome of this case. *(Resp. Br., p. i.)* It is, of course, obvious that, should the Court rule the declarations set forth in the petition constitute direct evidence of discriminatory intent, that ruling would not only change the outcome of this case, but would also affect the outcome of the many pending and future discrimination cases brought in the federal district courts across the country. Thus, the question presented, it must be conceded, is of great importance not only for this case, but for the many other pending and future Title VII cases filed in the federal courts.

The petition also affords this Court the opportunity to reaffirm the maxim that the law places no greater evidentiary burden upon plaintiffs in Title VII cases than in any other civil cases. *See, e.g., United States Postal Service Bd. Of Governors v. Aikens,* 460 U.S. 711, 716, 103 S. Ct. 1478, 1482 (1983). The declarations made by Goldberg: *"If you were my wife, I would not want you working after having children"*, and that Kennedy *"should be home with her kids now, with her child now, that she shouldn't be working"* constitute an acknowledgment of discriminatory intent sufficient to create a triable issue of intentional discrimination. Moreover, as a practical matter, declarations like Goldberg's are the only truly direct evidence of discriminatory intent that will ever be available in these types of cases since intent to discriminate is a mental state and mind reading is not an accepted tool of judicial inquiry. *See Troupe v. May Department Stores Company,* 20 F.3d 734 (7th Cir. 1994). Accordingly, no greater evidentiary burden should

be imposed upon Title VII plaintiffs than that which is imposed upon parties in any other civil case.

II. THIS CASE PRESENTS THE COURT WITH THE OPPORTUNITY TO DEFINE AND/OR CLARIFY DIRECT EVIDENCE OF DISCRIMINATORY INTENT

One of the many analytical flaws contained in the respondents' brief is their assertion that this Court has already addressed the very question presented in the Petition for Writ of Certiorari. The respondents apparently believe that the "stray remarks" contained in some of the opinions in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct. 1775 (1989), has risen to the level of the doctrine of "stray remarks" sanctioned and espoused by the full Court. *(Resp. Br. at pp. 4-7); contra Shager v. Upjohn Company*, 913 F.2d 398, 402 (7th Cir. 1990) (implicitly recognizing that the Supreme Court has yet to address this issue.)

This is not so. For had the respondents reviewed the Court's plurality decision in *Price Waterhouse* and the Petitioner's Writ of Certiorari, they would have learned that which is already known. That is, the plurality did not define, nor require, direct evidence of discriminatory intent, and Justice O'Connor's separate concurrence was written principally because of the plurality's failure to do so. *Price Waterhouse*, 490 U.S. at 277-78, 109 S. Ct. at 1805 ("[t]he plurality proceeds from the premise that the words 'because of' in the statute do not embody any causal requirement all all. Under my approach. . . . ").

From this faulty premise, the respondents arrive at the equally faulty conclusion that the definition of direct evidence of discriminatory intent already incorporates both a temporal and causal requirement. *(Resp. Br. at p. 5.)* The respondents would have this Court believe that a new rule of evidence emerged not of this Court's making, nor of Congress', but from a concurring opinion arising from a plurality decision, and grafted upon it were the requirements of time and cause. *Id.* It is the respondents' apparent confusion with the state of Title

VII case law that has prompted the very petition which is before the Court today. In other words, Goldberg's discriminatory declarations, coupled with this subsequent conduct, either does or does not constitute direct evidence of discriminatory intent, and that is for this Court to decide, not the respondents.

III. GOLDBERG'S DECLARATIONS CONSTITUTE DIRECT EVIDENCE OF DISCRIMINATORY INTENT

Assuming for the sake of this discussion that the evidentiary framework of Title VII embodies a temporal and causal requirement in the first instance, a requirement not found in the *Price Waterhouse* plurality opinion, (490 U.S. at 250, 109 S. Ct. at 1790-91), the temporal and causal requirements were met in this case. The causal requirement urged by Justice O'Connor in her concurring opinion held that "the plaintiff must produce evidence sufficient to show that an illegitimate criterion was a substantial factor in the particular employment decision such that a reasonable factfinder could draw an inference that the decision was made 'because of' the plaintiff's protected status." *Price Waterhouse*, 490 U.S. at 278, 109 S. Ct. at 1805. This causal requirement can be demonstrated by use of direct evidence. *Id.*

However, by defining direct evidence as only that "evidence which if believed, proves the fact of discriminatory intent without inference or presumption" the Courts of Appeals, including the Seventh Circuit, raises the evidentiary burden placed upon Title VII plaintiffs to proof of an "admission" or a "smoking gun." *Randle v. LaSalle Telecommunications, Inc.*, 876 F.2d 563, 569 (7th Cir. 1989). The Seventh Circuit recognized this evidentiary burden when it stated in this case, "[d]irect evidence of discriminatory intent in pregnancy discrimination cases generally *is in the form of an admission by a supervisor or decision maker* that the employee was suspended because she was pregnant." *Kennedy v. Schoenberg, Fisher & Newman, Ltd.*, 140 F.3d 716, 723 (7th Cir.

1988), *citing, Troupe v. May Department Stores Company*, 20 F.3d at 736 (7th Cir. 1994).[1]

This Court however, has never required evidence of discriminatory intent to rise to the level of "*admission*" before it is considered direct evidence. The most that can be said of *Price Waterhouse* is that this Court recognized the common sense proposition that a discriminatory slur is not always and in all cases proof of discriminatory intent in and of itself. *Price Waterhouse v. Hopkins*, 490 U.S. at 277, 198 S. Ct. at 1805. Consequently, somewhere between an "admission" and a "stray remark" lies the definition or meaning of direct evidence of discriminatory intent, and this petition provides a perfect vehicle for the Court's analysis of this critical evidentiary question.

A. GOLDBERG'S DECLARATIONS WERE TEMPORALLY RELATED TO THE ADVERSE EMPLOYMENT DECISION

Respondents go to extreme lengths to explain what Goldberg meant by his statements that Kennedy *"should be home with her kids now, with her child now, that she shouldn't be working."* The respondents' need to place Goldberg's statements in an innocent context is so great that they infer from a presumption Goldberg's state of mind when he made the comments. *(Resp. Br. at p. 1, fn. 3.)* It is odd indeed that the respondents here resort to rank inference and presumption when speculating what Goldberg's statements do not mean, rather than examining the discriminatory declarations at face value.[2]

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[1] Here, the respondents attack the petitioner for asserting that the Court of Appeals, including the Seventh Circuit, generally hold that evidence of discriminatory intent must rise to the level of an "admission" or "smoking gun" before it will be deemed "direct evidence" sufficient to shift the burden of proof. *(Resp. Br. at p. 4, fn. 6.)* These attacks, generally labeled as "disingenous", are a sloppy substitute for the proper review of Seventh Circuit case law on this issue.

[2] While the Seventh Circuit has previously noted that mind reading is not an accepted tool of judicial inquiry, the respondents believe it is an acceptable tool of persuasive legal argument. *(Resp. Br. at pp. 1, 2, fn. 3.)*

The petitioner, on the other hand, asks this Court to look at the plain words of Goldberg's declarations. Goldberg said: *"If you were my wife, I would not want you working after having children" and "Kennedy should be at home with her kids now, with her child now, that she shouldn't be working."* A fair reading of those statements, without resort to inference, presumption, or mind reading, is that Kennedy should be at home with her child now, she shouldn't be working.

Indeed, it was not mere coincidence that soon after giving birth to her child, Goldberg made good on his views of Kennedy working and having children. The evidence revealed that soon after Kennedy returned to work from her maternity leave, i.e., after giving birth to her child, Goldberg made sure that she was not working and was at home with her child. *(R. 100, Ex. 25.)* For it was Goldberg who insisted, in his October 23, 1992, memorandum delivered to all firm partners, that *he* intended to review the Kennedy matter fully and offer his recommendation at the firm's partner meeting on November 2, 1992. *(R. 82, Ex. 16(b).)*[3] Moreover, it was at this same partners meeting that Kennedy's employment with the firm was terminated. *(R. 100, Ex. 3, p. 49.)* Goldberg's statements themselves, coupled with his conduct of implementing his declared hostility toward

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Cf. Troupe v. May Department Stores Company, 20 F.3d 734 (7th Cir. 1994).

[3] The respondents incorrectly take the petitioner to task asserting that there is no evidence in the record before the District Court or the Seventh Circuit to support the statement that Kennedy's position with the firm was placed on the firm's November 2, 1992 partners meeting agenda by Goldberg. *(Resp. Br. at p. 2, fn. 4.)* The respondents need only examine Exhibit 16(b) of their own exhibits filed with the District Court and the Seventh Circuit to discover the evidentiary support for this correct statement of the factual record. *(R. 82, Ex. 16(b).)* In his October 23, 1992 "memorandum" to all firm partners, Goldberg wrote: "At our November 2, partners meeting, I intend to review the matter [Kennedy] fully with you and offer my recommendation." *Id.* The matter was reviewed, Kennedy was fired, and only the respondents' attorneys are unclear as to the nature of Goldberg's recommendation.

working women who have children, satisfies any temporal requirement of direct evidence of discriminatory intent.

B. GOLDBERG IS THE DE FACTO DECISION-MAKER AND THUS, HIS DECLARATIONS ARE CAUSALLY RELATED TO THE DECISION TO TERMINATE

The respondents' analysis is strained to the breaking point when they suggest that Goldberg was not the decisionmaker with respect to Kennedy's termination. *(Resp. Br. at 2.)* It is of course true that the partners of the firm collectively acted to terminate Kennedy's employment at the November 2, 1992 partners meeting. It is also true that Goldberg, a partner of the firm, declared that he himself would take the Kennedy matter up with his fellow partners at the November 2, 1992 meeting and offer his recommendation. What is untrue is the assertion that Goldberg was not the decisonmaker.

On November 2, 1992, Goldberg attended the partners meeting, Kennedy's future employment with the firm was discussed, Kennedy was terminated from the firm, Goldberg was, in the words of his fellow partner, "unusually quiet", and Goldberg himself triggered the review. *(R. 100, Ex. 3, pp. 49, 72; R. 100, Ex. 2, p. 78.)* The respondents however, insist that Goldberg was not the decisionmaker.

To this end, the respondents mistakenly assume that the phrase "decisionmaker" as employed by this Court in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct. 1775 (1989) must be Goldberg himself or the petitioner's case cannot survive summary judgment. *(Resp. Br. at p. 6.)* The respondents' argument misses the mark.

The decisionmaker in *Price Waterhouse* was the firm's Policy Board. However, the Policy Board relied upon the recommendation of the firm's Admission's Committee, who in turn relied upon information they received from the partners as a whole. A number of those partners, the court found, had considered Hopkins' failure to conform to gender stereotypes when it decided to place her partnership candidacy on hold. Justice O'Connor summed up the evidence as follows:

> It is as if Ann Hopkins were sitting in the hall outside the room where partnership decisions were being made. As the partners filed in to consider her candidacy, she heard several of them make sexist remarks in discussing her suitability for partnership. As the decisionmakers exited the room, she was told by one of those privy to the decisionmaking process that her gender was a major reason for the rejection of her partnership bid.

Price Waterhouse v. Hopkins, 490 U.S. at 272-73, 109 S. Ct. at 1802.

Similarly, SFN, acting through its partner Goldberg, terminated Kennedy's employment from the firm at the November 2, 1992 partners meeting. Goldberg had previously acknowledged his discriminatory intent that Kennedy shouldn't be working after having a child and that he would not want her working after having children.

One month after giving birth to her child, Kennedy was requested by one of the firm's and Goldberg's most important clients, to attend its annual association meeting. (R. 100, Ex. 9, pp. 23, 24-46.) Goldberg did not invite Kennedy to the meeting even though Kennedy had attended and worked at these meetings for the previous three years because, as Goldberg previously stated, "Kennedy shouldn't be working after having children" she "should be at home with her kids now."

Four months after giving birth to her child, and one day after returning from her maternity leave, Goldberg placed Kennedy on probation (R. 100, Ex. 25.) Placing Kennedy on probation immediately after returning from maternity leave was one more affirmative acknowledgment of Goldberg's discriminatory intent because "Kennedy shouldn't be working after having children" she "should be at home with her child now."

Less than two months after Kennedy returned from maternity leave, Goldberg informed his partners that he would review the Kennedy matter fully with them at the November 2, 1992 partners meeting and offer his recommendation to them. (R. 82, Ex. 16(b).) That night, on November 2, 1992, the firm terminated Kennedy's employment. (R. 100, Ex. 3, p. 49.)

Goldberg made good on his acknowledged discriminatory intent because Kennedy was now not working and at home with her child.

To paraphrase Justice O'Connor, it was as if Denise Kennedy were sitting in the hall outside the room the night the partnership decision was made to terminate her. As the partners filed in to consider her future with the firm, she heard Goldberg repeat his previous discriminatory remarks regarding whether Kennedy should be working after having children. As the partners left the room, she was told by one privy to the decisionmaking process that Goldberg placed her future with the firm on the partnership agenda, told his fellow partners that he would make a recommendation to them, the partners then fired her, and Goldberg was "unusually quiet" at the meeting. One would be hard pressed to think of a situation where such direct evidence of intentional discrimination did not create a triable issue of fact.

C. GOLDBERG'S DISCRIMINATORY INTENT IS ATTRIBUTABLE TO THE PARTNERSHIP

As previously noted, Goldberg insisted that Kennedy's future with the firm be discussed at the November 2, 1992 partners meeting. Kennedy's fate with the firm was then perfunctorily discussed by Goldberg's fellow partners. Kennedy was terminated at the partners meeting. Goldberg attended the partners meeting, abstained from voting, and was, in the words of his fellow partners, "unusually quiet."

Only the respondents' attorneys are unclear of Goldberg's recommendation and whether the law requires Goldberg alone be the decisionmaker before liability can attach. The respondents contend that the individual partners, as the de jure decisionmaker, somehow shields Goldberg and the partnership from the wrong committed by Goldberg. The respondents are obviously unclear of the common law rule of respondeat superior and are equally unclear of Seventh Circuit precedent holding that where a corporate committee acts as a conduit of the employee's prejudice – his cat's paw – the innocence of the

committee members cannot shield the corporation from liability. *Shager v. Upjohn Company*, 913 F.2d 398 (7th Cir. 1990).

The common law rule is that an employer is liable for the intentional acts of its employees committed in furtherance of their employment. *Burlington Industries, Inc. v. Ellerth*, ___ U.S. ___, 118 S. Ct. 2257, 1998 WL 336326 (1998). This rule is applicable to statutory torts such as those proscribed by Title VII of the Civil Rights Act. *Id.* (*an employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over an employee).*

Moreover, simply because Goldberg alone did not make the decision to terminate Kennedy, that fact does not absolve him or the partnership from liability under Title VII. Where the facts show that the decision to terminate was tainted by Goldberg's prejudice towards Kennedy, the partnership itself cannot be set-up by the respondents' attorney as a clever liability shield to protect Goldberg. If the partnership acted as a conduit of Goldberg's prejudice, i.e., his cat's paw, the innocence of its members would neither spare Goldberg nor the partnership from liability under Title VII. *Cf. Shager v. Upjohn Company*, 913 F.2d 398, 405 (7th Cir. 1990).

Here, the partnership's decision to terminate Kennedy was certainly triggered and tainted by Goldberg's prejudice against Kennedy. Goldberg not only set up Kennedy to fail by placing her on "probation" one day after she returned from maternity leave, he also influenced the partnership's decision by portraying Kennedy's performance in the worst possible light. In other words, Goldberg's influence was decisive on the issue. *See Shager v. Upjohn Company*, 913 F.2d 398, 405 (7th Cir. 1990).

The evidence further demonstrated that Goldberg himself instigated Kennedy's termination when he informed his fellow partners that he intended to review the Kennedy matter with them at the November 2, 1992 partners' meeting and offer his recommendation. That night, the partners perfunctorily reviewed the matter, terminated Kennedy, offered a male law

school graduate a position with the firm,[4] and no one recalls Goldberg's recommendation because he was "unusually quiet" at this particular meeting. Thus, the partnership itself was simply Goldberg's paw, and that paw is as inseparable from the body of the cat as Goldberg is as inseparable from the body partnership.

CONCLUSION

In sum, the evidence in this case is not unlike the evidence presented in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct. 1775 (1989). It is noteworthy that in *Price Waterhouse*, this Court's plurality held that such evidence was indeed direct evidence of discriminatory intent. 490 U.S. at 277, 109 S. Ct. at 1805 (*O'Connor, J. concurring opinion*). Here, based upon unsettled definitions of direct evidence, the Seventh Circuit held that the evidence presented in this case neither constituted direct or circumstantial evidence of intentional discrimination so as to avoid summary judgment. *Kennedy v. Schoenberg, Fisher & Newman, Ltd.*, 140 F.2d at 723 (7th Cir. 1998). Consequently, this case presents this Court with the opportunity to define and/or clarify this important evidentiary question. It is for these reasons, that the Petitioner respectfully requests that her Petition for Writ of Certiorari be granted.

Respectfully submitted,

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[4] The respondents also claim that Kennedy never "performed litigation work with the firm." *(Resp. Br. at p. 3, fn. 4.)* The evidence contained in the trial court record as well as in the record before the Seventh Circuit Court of Appeals revealed that Kennedy had indeed performed litigation work for the firm. *(R. 100, Ex. 3, p. 55; Ex. 33.)*